information to those involved, those who have the oversight of the intelligence community; namely, your fellow Senators and Representatives who are members of the Intelligence Committees. See page 13, section 502(c).

Senator METZENBAUM. I am not sure I followed why you said that he should be denied the defense, even though the prima facie case is made, and a solid case is made as relates to the prosecutorial aspects of the matter. Why shouldn't the defendant be allowed to show that the agent was involved in illegal or improper activities? Why shouldn't he be permitted to have that taken into consideration?

Senator CHAFEE. Well, because the damage has been done, Mr. Chairman. He exposes an agent—in the course of a pattern of activities, he exposes *a*, *b*, *c*, *d*, believing in his own mind that these agents are guilty of unlawful activity, so he is going to expose them. The damage is done then.

Senator METZENBAUM. The damage is done, and in any personal injury case, you prove that the defendant was negligent, but the defendant is allowed to prove as an affirmative defense that there was contributory negligence. Here, you prove that he has violated the aspects of the law that you have included, but as an affirmative defense, or at least in mitigation, he wants to offer evidence that the agent was involved in criminal, illegal, or improper activities. Why should we deny him that right?

Senator CHAFEE. Well, because we have provided other routes for that, Mr. Chairman, other avenues, in that, if he believes this, he can go to the authorities who are responsible.

But meanwhile, if you take the proposition you have made, the disclosures are made of the agents, and a series of disclosures, to meet this pattern of activity.

Senator METZENBAUM. Senator, I am not questioning that he can go other routes, although I am not sure he would get very far in going other routes. If he went to somebody in the CIA and said, "Say, do you know that you have an agent over there in *x* country, and he is involved in illegal or improper activities," I do not think he would get by the receptionist.

Senator CHAFEE. No, no, but, Mr. Chairman—(c) says to the very committees of this Congress. Now, if they are not doing their job, then we ought to make some changes.

Senator METZENBAUM. Is that 502(c)?

Senator CHAFEE. On page 13.

> It shall not be an offense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence or the Permanent Select Committee on Intelligence, the House of Representatives.

Now, if they are not performing, then let us make some changes around here.

Senator METZENBAUM. Senator, I think you and I would both agree that somebody picking up the telephone or coming in and seeing the Select Committee on Intelligence is not the same as an affirmative defense. It may not be taken into consideration. It may be considered as totally irrelevant. But it seems to me that a defendant should not be precluded from asserting the fact that the CIA agent who is exposed was engaged in illegal or improper activities. And then, it may or may

not be taken into consideration by either the jury or the court. But I do not know why there is a denial of that right.

Senator CHAFEE. Well, let me just give you an example, Mr. Chairman, whatever "illegal activities" means. You have an agent in Athens. And the agent is doing a series of activities. Let us say one of those activities is illegal or improper. Now, is that a defense that in the total course of his duties, he does something improper that therefore we shall have the exposure of the identification of this agent. Now, I do not think we want that.

Senator METZENBAUM. I will not press that point further. I am not sure we are in agreement on it, but if we——

Senator CHAFEE. Well, I think the point I am making, Mr. Chairman, is what is the improper activity that justifies the disclosure of the names of a series of agents. Is he driving without his driver's license, or is he tapping somebody's phone he should not be tapping?

Senator METZENBAUM. Let me ask you, would you find it a detriment to the bill to at least permit the defendant to raise that issue, not as a total defense, but at least in mitigation? Would you find that it in any way would lessen the validity and the strength of the legislation if the defendant were permitted to offer that evidence, not as a total defense, but conceivably in mitigation? Let us assume that he wants to prove that a particular CIA agent was involved in a murder and had been involved in causing various persons to lose their lives. Would it be inappropriate for him to offer that kind of evidence in defense of his disclosure? Would it be improper to reveal that?

Senator CHAFEE. You know, each of these casese are difficult. What is the illegal activity? If he wants to write one article—I think we have agreed on that—agent so-and-so, and exposes it in the course of a story, that would not fit a pattern of activity, so he is not subject to prosecution anyway. But if he is going to write a whole series of exposures, as it were, each of them in which he says he has some kind of a defense, I just feel that the whole purpose of the act is thus going to be vitiated if we let him make the disclosures and then, subsequently, he comes up with some kind of a defense in mitigation of what he has done.

Senator METZENBAUM. Let us assume a magazine article writer wants to write an article, "Were These CIA Agents Involved in Killing . . .?" and then you have a series of pictures of certain international leaders, the names of which I will not mention at the moment. We have all heard stories about the CIA being involved in the loss of life of certain international leaders.

I am not certain that some of them, if the allegations were true, were acting in my nation's best interest and your nation's best interest. Now, let us assume that he writes a series of articles and proves that x was involved in the murder of y, a was involved in the murder of b, and r was involved in the murder of s, and that they had been planned and conceived and schemed and plotted. Maybe the agent actually did not even serve our nation's best interest. Maybe some guy who was the head of the CIA at that time thought he did, or maybe he was off on his own gambit. Maybe he was just a leader in that particular company, a local station.

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Now, my question to you is, would the writer of that article, who wrote maybe one or two or three other articles, who was involved in a series of investigations——

Senator CHAFEE. He met the pattern of activities standard.

Senator METZENBAUM. Yes. Now, frankly, Senator, I am not sure that he would not be serving our nation's interest best if he disclosed based upon good and conclusive evidence that these certain people had been murdered as a consequence of CIA plans. Would that be wrong? Would that violate the law?

Senator CHAFEE. Well, I think that he might well have a better defense under this that his intention is not to identify and expose covert agents, but his intention is to expose illegal actions. I think he would have a defense within the act right there, under the illustration that you gave.

And furthermore, I am not even sure he has got to reveal the names. I mean, the story would have plenty of sensation to it, "CIA Murders Allende," or whoever it is.

Senator METZENBAUM. Not without the names. It would not sell.

Senator CHAFEE. It would not sell, you do not think? All right, so he puts in the names.

Senator METZENBAUM. I do not think you could get any of the magazines to carry the story unless you named the players. And if you name the players, my guess is you might be able to base at least some portions of that kind of a story, upon rumor. Now, I just think that that would serve our national interest.

Senator CHAFEE. Well, first of all, you are better perhaps at knowing what sells and what will not sell——

Senator METZENBAUM. I would not say that. You probably would not be here if you did not know what sold, in some ways.

Senator CHAFEE. But frankly, I do not think it is necessary to have the agent. But even if the name of the agent were involved, I think he is protected under this act in that the pattern of activity is not intended to expose covert agents but is to expose wrongdoings of the CIA. And I think he has got a pretty good defense right here under this (c) as we have presently got it.

Senator METZENBAUM. Thank you, Senator, very much. I am looking at the time, and I do not know how I am ever going to finish this morning.

Senator CHAFEE. Thank you.

[The prepared statement of Senator Chafee follows:]

PREPARED STATEMENT OF SENATOR CHAFEE

Mr. Chairman, I am delighted to appear here today to comment on the Intelligence Identities Protection Act (S. 2216) which was recently reported from the Senate Intelligence Committee by a vote of 13/1, and which has now been referred to your Committee for consideration.

From the time George Washington dispatched Benjamin Franklin to France in 1776, the government of the United States has sent American citizens abroad on difficult and dangerous missions in pursuit of the goals of our nation. In 1947, this activity was institutionalized by President Truman with the formation of the Central Intelligence Agency, and a permanent cadre of covert agents was created. Covert action and the assignment of Americans abroad—our fellow citizens—to carry out such action has had and now has the support of every administration since President Truman and every Congress, including this one, to which each of us belongs.

In the last five years, certain other Americans have made a profession of ferreting out the identities and publishing the names of these agents, with the result that their lives, and the lives of their families and friends, are placed in jeopardy. Richard S. Welch of Rhode Island was murdered as a result of this "naming names". The lives of others have been threatened. Yet, there is no law on the books today under which this activity of "naming names" can be prevented.

This is an intolerable situation. As legislators, I believe that we have a responsibility to draft a bill which places criminal penalties on those who are in the business of exposing our agents, and, which, at the same time, does not threaten the critic of intelligence policy or the journalist who might reveal the name of an agent in the course of a news report.

In my judgment, and in the judgment of the majority of my colleagues on the Senate Intelligence Committee, the Intelligence Identities Protection Act of 1980 meets this dual standard. However, because the question has been raised as to whether this bill chills First Amendment rights, I would like to focus specifically on this issue as I address your Committee here today.

The section of the First Amendment to the Constitution that pertains to our discussion states that "Congress shall make no law. . . . Abridging the freedom of speech, or of the press . . ." The first point that I wish to make with regard to this amendment is that the provisions of the Bill of Rights cannot be applied with absolute literalness, but are subject to exceptions. It has long been recognized that the free speech clause of the Constitution cannot wipe out common law regarding, for example, obscenity, profanity, and the defamation of individuals, for example. This point was reiterated by Justice Oliver Wendell Holmes in the Classic Espionage Act decisions in 1919 when he stated that:

"The First Amendment . . . obviously was not intended to give immunity for every possible use of language . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."

A second, and equally important point, is that if unlimited speech interferes with the legitimate purpose of government, there must be some point at which the government can step in. My uncle, Zechariah Chafee, who was the leading defender of free speech during his thirty-seven years at the Harvard Law School, wrote in his book titled *Free Speech in the United States* that:

"The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war. Thus, our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts." (Chafee, *Free Speech in the United States*, p. 35.)

It is clear, Mr. Chairman, that the activity of "naming names" has given rise to unlawful acts, and that it has endangered the safety of American citizens serving abroad. I have already mentioned the murder of Richard S. Welch in Greece. I am sure all of you also remember the recent series of assassination attempts in Kingston, Jamaica, following Louis Wolf's publication of the names of 15 alleged CIA officers there last month. The Director and Deputy Director of the CIA have testified publicly and in closed session before the Senate Intelligence Committee on a number of occasions regarding this activity. It is clear that the safety and the missions of those named have been placed in jeopardy by "naming names".

What is not so clear, is where "naming names" contributes to what my uncle has characterized as the important social interest of "the search for truth". For example, it is difficult to see how the knowledge that a particular individual serving in an Embassy abroad is paid by CIA rather than the State Department materially contributes to our search for the truth.

In this regard, Mr. Chairman, I think that it is essential to point out that this bill would not prevent Mr. Agee from publishing the articles contained in his publications, obnoxious though they be. This bill would only restrain his publication of the names of persons he claims are covert agents. By the same token, there is

nothing in this bill which would prevent Mr. Louis Wolf from continuing to publish the *Covert Action Information Bulletin* which does contain articles purported to be based on "research" into U.S. intelligence operations at home and abroad. The only impact of this legislation would be on the section of the *Bulletin* titled "Naming Names". In fact, there is nothing in this law that would prevent Wolf from giving anti-CIA or anti-American speeches in Jamaica as long as the speeches do not contain the names of alleged CIA agents.

Mr. Chairman, I hope that this brief review of Constitutional history will show that the First Amendment does not provide absolute protection for all speech, and that the government can, in certain circumstances, intervene in the exercise of free speech in the interest of public safety, without jeopardizing the search for truth. As Attorney General Civiletti stated earlier this year on this subject, "our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the nation in difficult times and under dangerous conditions". It goes without saying that these important constitutional considerations were very much in our mind when my colleagues and I worked up the final draft of the Intelligence Identities Protection Act. We are not challenging the Constitution. We are working with it. In my judgment, we have worked well within its limits. We have successfully followed what my uncle called the "boundary line of free speech".

In turning now to the specific provisions of our bill, I would like to make several observations which I hope will show that, from a practical as well as a Constitution standpoint, this bill is the best solution to the legislative problem which we face.

The Senate Intelligence Committee has held a number of hearings on intelligence identities protection legislation. In particular, we have focused on the provisions of S. 2216 which was originally introduced last January, in other words, well before. While most witnesses expressed support for what are now Sections 501(a) and 501(b) of our current bill, many witnesses, including the Justice Department, raised questions on the section of the bill which made criminal the disclosure of intelligence identities by anyone who acted "with the intent to impair or impede the foreign intelligence or counter-intelligence activities of the United States..."

The Justice Department and others felt that this "intent standard" was objectionable because it might lead to a prosecution which would turn on the political motivations of the accused. For example, the writer might defend his disclosures on the grounds that his intent was to improve, not impede, the foreign intelligence activities of the United States. In order to avoid this problem, I offered an amendment to the original version of S. 2216 which, in Paragraph 501(c), adopts a standard of prosecution based on the "pattern of activities" rather than the "intent" of the discloser. This amendment, which was supported by the Justice Department and adopted by the Senate Intelligence Committee, provides that:

"(c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both."

This section is very carefully drawn because a person must disclose information identifying a covert agent in the course of a pattern of activities which are intended to identify and expose covert agents. We have carefully differentiated between the journalist who may reveal the name of an agent in a news article and the person who has made it his purpose and business to reveal the names of agents, and has engaged in a pattern of activities intended to do so. Clearly, the legitimate journalist would not be engaged in such a pattern of activities. I should note that the "intent" in this case is what is known as an "objective" intent—that is, intent in which the person intends the logical consequences of his act. It is not dependent on his political beliefs, motivations or opnion. Thus, the vehemence of his criticism of the CIA or the United States is not an issue.

There are other standards and protections here as well. First, in order to be liable for prosecution, a person must act with reason to believe that his disclosure would impair or impede the foreign intelligence activities of the United States. Someone who revealed the names of all CIA agents operating in the Soviet Union

would certainly have reason to believe that such disclosure would impair or impede U.S. intelligence activities. On the other hand, a journalist who revealed in a news story about the U-2 incident that Francis Gary Powers was an American agent would have little reason to believe his disclosure would or could further impair or impede U.S. intelligence operations. Nor, for that matter, would he be engaged in the requisite "pattern of activities."

Second, in order to be liable, a person must know that the information disclosed so identifies the covert agent. A journalist who reported, for example, a general statement that CIA officers serve undercover in U.S. embassies would not be liable because that information would not by itself identify a covert agent. However, a person who identified a particular officer by position, personal description and gave his home address would clearly know that he was identifying such an agent.

Finally, to be convicted of this crime, a person must know that the United States is taking affirmative measures to conceal an individual agent's classified intelligence relationship to the United States.

In summary, Mr. Chairman, we have drafted a bill designed to stop those engaged in the business of "naming names" and we have carefully drafted it to protect the legitimate rights of free speech of the journalist, however critical he may be of the CIA, its activities or its policies. The Justice Department has not only withdrawn its objection, but has actively supported this legislation because, in the words of Deputy Attorney General Renfrew, "the formulation substantially alleviates the Constitutional and practical concerns expressed by the Justice Department with regard to earlier versions of this bill. . . . (I ask that a copy of Mr. Renfrew's letter be placed into the record with my remarks.)

There is one additional issue which I believe must be addressed before I conclude my remarks because there has been so much confusion surrounding it. During the long public debate on this issue, and in the hearings before the Senate Intelligence Committee, I have heard it suggested or implied that it should be acceptable for people to disclose the names of covert agents if this information derives from unclassified sources. The implication of this view is that there exists somewhere in this government an official but unclassified list of covert agents, and that those who have found this list should be free to publish the names thereon.

Mr. Chairman, I have studied the matter of cover for covert agents within the Senate Intelligence Committee, and have even held a series of detailed hearings on this subject. Without going into specifics in open session, I can assure you that there is no such list. What we have found are unclassified official or semi-official documents which contain the names of covert agents in among the names of other officials of the U.S. government. The covert agents are *NOT* identified. The very purpose of these documents is to cover or to hide the true identity of the covert agents named thereon, and in no case is an identification explicitly made.

However, to say that the government has never published an unclassified list of covert agents as such does not mean that certain persons, employing basic principles of counterespionage, and after considerable effort, cannot determine identities of covert agents with some degree of accuracy.

It is the purpose of S. 2216 to punish the publication of names acquired through these techniques regardless of whether the identification was made with reference to classified or unclassified information. After all, it is not the mechanism of identification which places people's lives in jeopardy and threatens our intelligence capabilities. It is the actual publication of people's names as covert agents that does so. It is the pattern of "naming names" that we want primarily to prevent.

In closing, Mr. Chairman, I would like to clarify several misunderstandings or misstatements that have crept into the debate with regard to this legislation.

—The purpose of this legislation is not to "get" any group of individuals, but to criminalize a particular activity which jeopardizes the lives and missions of American intelligence officers serving abroad;

—The current version of the Intelligence Identities Protection Act of 1980 does not criminalize the "intent" of those who are "naming names", but the pattern of activities in which they are engaged;

—This bill is not a hasty response to recent events in Jamaica, but the product of legislative efforts dating back to the 94th Congress in 1975 and this current

—This Act has not been drafted over the objections of the Justice Department and the press, but actually reflects the concerns and incorporates the recommendations of these entities in its current form.

Originally, Mr. Chairman, the Justice Department reports that over the past five years more than 2,000 names of alleged CIA officers have been identified and published by a small group of individuals whose stated intention is to "expose" U.S. intelligence operations. I think it is time we legislated an end to this pernicious vendetta against the American intelligence community, and I urge you and your colleagues on the Judiciary Committee to move expeditiously in reporting this bill out of Committee before more lives are jeopardized and more damage is done.

And finally, Mr. Chairman, this is a key point I wish to leave with you.

The easiest role we might assume is to do nothing; to brush aside the problem because the solution is too difficult. We send fellow Americans abroad on dangerous missions which are supported by us as Senators and by our Administration. We owe it to them to do our utmost to protect their lives as they go about our business.

Thank you.

Senator METZENBAUM. Congressman Aspin, we are very happy to have you here with us. You are a very distinguished member of the House, have served our country very well in your congressional responsibilities, and I consider it a privilege to have you testify before us today.

Now, having made that very laudatory statement about what a good Congressman you are, I would appreciate it if you would not be too lengthy, because you know the pressures.

STATEMENT OF CONGRESSMAN LES ASPIN

Mr. ASPIN. Thank you, Senator.

Why don't I just talk from my statement, because I know you have a lot of witnesses today, and we do not want to take up a lot of time.

Senator METZENBAUM. Your full statement will be placed in the record following your oral testimony.

Mr. ASPIN. I am a member of the Select Committee on Intelligence in the House, and we have been dealing with this legislation now both in the Intelligence Committee and over in the House Judiciary Committee. My opinion of the legislation is one that, realistically speaking, I guess, is in the minority so far as we have seen it work its way through the House. I was very worried about this third section, section (c) of the legislation, when we first took the matter up in the House Intelligence Committee, but I seem to be the only one who was worried at that time. The Judiciary Committee of the House looked at the legislation, and there seemed to be more people who were worried about section (c) there, but, still a minority. And the language that has come out of the House Intelligence and Judiciary Committees is very, very similar to the bill before you. It is slightly different in section (c), but basically, it is essentially the same.

I think what we see, of course, Senator, is a great deal of agreement about this legislation from the whole political spectrum. Everybody that I know has been very unhappy with what is being published in the "Covert Action Information Bulletin," thinks that information that is being revealed and which puts people's lives in jeopardy is reprehensible conduct, and, in general, there seems to be no problem with a great deal of the bill, particularly sections 501(a) and 501(b).

The problem comes, as you know from the hearings this morning, with section 501(c), and that is the focal point of the problem.

Let me just make two points about this and then answer whatever questions you have.

The first point that I would like to make is in connection with the series of questions that you were addressing to Senator Chafee just a moment ago, which is whether that language in section 501(c) can in fact be abused. My impression is that there is a danger that it can be. All of us who have been dealing with this bill are, of course, people who know what we are trying to accomplish and know what that language is trying to do, and presumably, would not abuse the language or abuse that provision. But the danger is that the language as it is written seems to me to be potentially the kind of thing that can be abused, and I am worried about several aspects of it.

The series of hurdles that Senator Chafee mentioned seem to me to be not really very high hurdles to overcome. A pattern of activities must be shown—that whoever is prosecuted must have conducted a pattern of activities—but that seems to me to be imminently possible. If you write a series of articles in a newspaper or magazine, that could be a pattern of activities; that could impair or impede the foreign intelligence activities of the United States. Yes. I mean, any investigative piece of journalism would be trying to impair or impede at least that foreign intelligence activity of the United States. So that, I think, is provable.

Senator Chafee also mentioned requirements to show that a defendant cited, "knowing that the information disclosed identifies" such an individual, and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States. Everybody understands that the CIA is trying to conceal individual classified intelligence relationships to the United States. And it is very important, it seems to me, that this language refers to disclosing any information that identifies an individual as a covert agent.

In your dialog with Senator Chafee, he was mentioning the fact that the article would have to name names. It would not have to name names in order to be prosecuted under this law. The language of the statute says,

Discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information.

In other words, you do not have to say his name. You have to give enough information that that individual can be identified. Well, that seems to me to be treading on a path that is very, very dangerous. And what is likely to happen, or the danger of what could happen is that this langauge could be abused, and you would end up prosecuting somebody that those of us who are passing this language and voting on this language had no intention to prosecute.

One other point: Senator Chafee mentioned—and we were talking about—whether it is a defense if the writer points out that the activity that he was trying to expose was illegal.

It shall not be a defense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or the Permanent Select Committee on Intelligence of the House of Representatives.

What the authors of this language seem to be saying is that if a person sees an abuse or has information of an abuse taking place, then the proper avenue to go is through the intelligence committees—in other words, not to go public with the information, but rather, go to

the intelligence committees themselves and have them, therefore, deal with the abuse in a way in which you do not have to go public with the information and do not have to make it public.

I think that is a good idea, and it is important that people do take abuses that they perceive to the intelligence committees. But I would hate to have a law written that that was the only way in which an abuse can be made known to authorities.

Senator METZENBAUM. What do you think of that procedure, realistically?

Mr. ASPIN. In a realistic manner, it is not a very good prevention of abuses.

Senator METZENBAUM. A fellow walks in off the street and says that he wants to discuss something, but he actually only sees a staff person for the moment, and that person thinks he is not dressed right and that he is flakey, and he does not want to pay any attention—or else, he grabs you in the hallway, or Senator Bayh or Senator Biden, or somebody else, Senator Huddleston, in the hallway. Is that very realistic as being a way to make such a——

Mr. ASPIN. No. Senator, I agree entirely with what you are saying there. The problem on all of these is that it is a judgment call. The staff is spread very thin. I am the chairman of the Subcommittee on Oversight of the Intelligence Committee in the House. And we get people coming in that door all the time with some strange tale about abuse in this place and that place, and we have to deal with them. We investigate a little bit in all of the cases and try and find out whether what is going on here is plausible and try to probe further. But it is entirely possible that in that process, somebody could have some information and be absolutely right, and that we would miss it; that on first glance, it did not look feasible, it did not look plausible, but that in fact, what that person was saying was absolutely correct. But because we have so many crazies and so many nuts that come in that door, you tend to be kind of callous to people that come in like that.

There is the press of other business, and we have other things to do, and we do not want always to be just reacting to things that come in the door. You want to have an agenda of your own of some things that you are trying to accomplish. It just is not a very adequate insurance.

I hope that over time, the Intelligence Committees of the House and the Senate can show a good track record, that they pick up on the issues where there is a case, and that they have enough sense to investigate and drop the issues where there is not. But I would hate to have a law written that says that that is the only avenue. I think it is dangerous.

And history has shown that there are other examples of other committees. After all, the Pentagon Papers, it seems to me, were sitting over in the files of the Foreign Relations Committee for a year, and nobody over there thought they were all that important. I think a lot of people over there thought there was old information in them, and they did not realize that it would "sell," and eventually, of course, Dan Ellsberg sent copies to the New York Times.

But what that shows is that people have different perceptions of the same piece of information. A committee or committee staff, or a couple of staffers, can look at something and say, "This looks crazy; there is nothing here to it," and in fact, then, there is.

Senator METZENBAUM. Congressman, let me ask a couple of questions. As the bill is currently written, do you think it covers these activities,

> Disclosures of the identities of agents as an integral part of another enterprise, such as media reporting of intelligence failures or abuses; academic studies of U.S. Government policies and programs; or a private organization's enforcement of its internal rules.

Now, that language comes from the Senate Report at page 18.

Mr. ASPIN. I think it does. I think you can get a certain set of circumstances where people pursuing those three different activities that you mentioned could be subject to prosecution under the bill as it is worded.

Senator METZENBAUM. How would your amendment help to limit the coverage of section 501(c)?

Mr. ASPIN. Well, the amendment that I offered both in the committee, and then tried to convince the Judiciary Committee to take up, was an amendment which expanded on a provision that is already in the bill, which says that it is a defense for anybody to show that the Government has already revealed the name of the agent. And that is already in the bill, where it says if the Government has already revealed the name, you cannot prosecute somebody for using that name. What I was doing was to expand that into another section, which said that it should also be a defense for the defense under prosecution under this bill if the defenders can show that they got the information from unclassified sources. That was the amendment that I offered, because I thought that would offer the kind of guarantees that the language needed in order to protect the bill from going after people we did not intend that it go after.

Senator METZENBAUM. Is the substitution of "reason to believe" there is harm to foreign intelligence activities preferable to the House bill's requirement that there be an "intent" to harm foreign intelligence activities?

Mr. ASPIN. No, I think it is worse. And I think that Senator Chafee believes that it is better. I think it is worse because "reason to believe" is a lower standard of proof than "intent." In the case where you have to prove that they have reason to believe, you are just saying this person had a reason to believe that such activities would impair. Whereas, the other is the language of intent. I would prefer, if I had to take one of them, the House language of intent.

Senator METZENBAUM. Would you not say that intent is difficult enough to prove in any matter of litigation?

Mr. ASPIN. Yes.

Senator METZENBAUM. Then, if you go beyond that and have the language of "reason to believe" instead of "intent," that you have substantially lowered the degree of proof that is necessary.

Mr. ASPIN. That is my impression.

Senator METZENBAUM. We are told that section 501(c) differs substantially from all other statutes which criminalize disclosures of intelligence information. In your opinion, does it, and if so, how?

Mr. ASPIN. I think I am, perhaps, not the right witness to address that question to, not being really familiar with the law here and the different aspects. So if you do not mind, let me pass on that one.

Senator METZENBAUM. Congressman Aspin, I want to thank you very much——

Mr. ASPIN. Mr. Chairman, may I raise one issue before I leave, and I think it is a very important issue, which I urge you to try and sort out with the other witnesses that are coming up. We have examined the language of this bill in terms of whether it can be abused by prosecuting people that we did not want prosecuted. The other side of that question, and the other question that needs exploring is, suppose we took this language out, suppose we knocked out 501(c) entirely. How difficult would it be to protect what the CIA wants to be protected, namely, the names of agents? In other words, how much damage are we doing, or what are we doing to the question by taking out 501(c)? And that gets to the heart of the question of whether or not it is possible to figure out the names of covert agents by relying solely on unclassified sources. And that, I think, is a very difficult question, and it is a question on which it is not easy to get a clear reading on.

I have looked at the testimony of the CIA, of Mr. Carlucci, who you have appearing as a witness this morning, and other testimony by Stan Turner and others. The first question is, if we have this 501(c) language, can it be abused, and can you go after journalists or people who are trying to clean house in academia? The second question is, if you put in some of these amendments that we have been talking about, does that mean it is impossible for the CIA to protect the names of their agents? And I think that is a very important issue to go into.

And the question does not seem to be very easily answered, and I think there are a lot of questions about how much cover is being provided for CIA agents, and whether it is possible, through using unclassified sources, to identify them. And if the answer to that question is yes, then the question is, "Is this law the right way to go about it, or should there be a better way of providing cover in order to protect those people?" In other words, if it is possible for a Phillip Agee or somebody like him to identify agents and expose agents solely by using unclassified information—which, of course, must be the rationale behind this bill—then the question is, if that is the case, is this language of this bill the way to stop that or, given the constitutional problems that it raises and the first amendment problems that it raises, isn't the better way to go about it to provide better cover so that it is not possible to identify agents.

Senator METZENBAUM. We will get into it.

Thank you very much, Congressman.

Mr. ASPIN. Thank you, Mr. Chairman.

Senator METZENBAUM. The committee will take a 5-minute recess.

[A short recess was taken.]

[The prepared statement of Congressman Aspin follows:]

PREPARED STATEMENT OF LES ASPIN

Unfortunately, the really important tests of the Bill of Rights and especially the First Amendment are often brought on by individuals and causes who may be intensely unpopular.

This is the situation with H.R. 5615, the Intelligence Identities Protection Act.

This bill embodies the sharp disapproval of an overwhelming majority of Americans at the actions of a few self-appointed guardians of the public morality, who have decided in their wisdom that we no longer need covert action intelligence capabilities.

There is no question but that the activities of men like Phillip Agee have weighed heavily on the minds of intelligence officers working under cover abroad. There is no question but that when a journal such as the Covert Action Information Bulletin publishes the names of persons said to be members of CIA in Jamaica, and those persons are exposed to physical jeopardy, most Americans are outraged.

The danger is that, motivated by anger and working in haste, we will offer up legislation that is unwise, that taxes the First Amendment, and weakens its protections and guarantees. Should that happen, the best we can hope for is that the Supreme Court would strike it down or narrow the bill in ways that deprive it of meaning—but then we would be left still facing the problem of how to deal with this issue.

H.R. 5615 is a product of a long effort to avoid those pitfalls. The bill in its present form shows major effort to define the divulging of names of agents as a criminal act narrowly enough so that it does not embrace legitimate exercises of freedom of speech or freedom of the press.

Nevertheless, I believe that the Bill errs in at least one fundamental way. Section 501(c) was drafted specifically with the Covert Action Information Bulletin in mind. It reads:

"(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be finded not more than $15,000 or imprisoned not more than three years, or both."

The key phrase here is "any information that identifies a covert agent". This means not just classified information, but all information including unclassified.

The question of whether or not it is possible to figure out the names of covert agents reliably from unclassified sources is one which seems to give the CIA a lot of difficulty.

I have reread testimony given by Mr. Carlucci, the Deputy Director of Central Intelligence, when he addressed the names of agents problem in various appearances before the House Permanent Select Committee on Intelligence, and I have also read Admiral Turner's letter of September 2, to the Chairman of the House Committee on the Judiciary.

In no case do I find a flat answer to the question of whether it is possible to reliably and accurately discern the names of agents from unclassified sources of information alone. The CIA denies that there is any one document where this information can be found, but concedes that it is at least latent in a number of unclassified sources. This potentially damaging comment on the way we provide cover for our agents is at once qualified, however, by CIA's further claim that the names of agents can be determined from this latent information only if two other critical elements are present: inside guidance from what Admiral Turner called "faithless former government employees," and a certain amount of snooping and physical surveillance.

CIA's problem is not hard to understand. Surely CIA would not want to admit that cover arrangements are so poorly designed that they can be penetrated by a little work in the public library. If so, then it should be the CIA which goes back to the drawing board to improve those arrangements, and the Congress ought not to be asked to dip into the First Amendment to make good on what the CIA has done poorly.

On the other hand, CIA apparently doesn't want to claim that unclassified information is valueless as a means to detect covert agents, because then there is no reason to include unclassified information in the Bill.

An interesting fact about cover arrangements, in contrast to almost any other kind of secret, is that the government should have the best chance of keeping this knowledge to itself, among all the secrets it possesses.

Each piece of information that gets written and sent into the world about an individual who is under cover is the result of an act of decision by someone in the Executive Branch.

If the government eventually allows so much different information about cover arrangements to get out into the unclassified world—and not through leaks mind you, but legitimately, in this or that piece of paper—that you can piece together the names of agents, in a sense the government itself has revealed the names of those agents.

H.R. 5615 comes close to recognizing this idea. Section 502(a), under Defenses and Exceptions provides that:

"It is a defense to a prosecution that before the commission of the offense with which the defendant is charged, the U.S. had publicly acknowledged or revealed the intelligence relationship to the U.S. of the individual the disclosure of whose intelligence relationship to the U.S. is the basis for the prosecution."

That's a reasonable position to take, and it's too bad the principle wasn't carried through to its logical conclusion.

If we ever get a situation where persons did not get the names of agents from classified sources, but from careful research involving unclassified sources, H.R. 5616 says that those persons could be prosecuted.

We shouldn't be in the business of prosecuting people for applying unclassified information that the government freely gave out, even if we don't like the purposes or the product.

I am not arguing that the First Amendment is absolute. There have been instances where the Government has established the constitutionality of its right to limit speech. But the tests for these limits are severe, involving jeopardy to lives, and imminent danger to the survival of the nation, as in time of war.

But if you look at the advocacy CIA has mounted on behalf of H.R. 5615, I think it will be clear that the core of their problem is something else, better defined as administrative inconvenience: the loss of trained agents, the embarrassment to liaison relationships with other intelligence services, and so on.

At that level of injury, where we are talking mainly about impeding the progress of this or that intelligence program, I do not think the Constitution allows us to punish individuals who use unclassified information to say things we dislike, however heartily.

That is why I believe that 5615 should not extend to the products of unclassified information. Therefore, when the Bill was under discussion in the House Permanent Select Committee, I introduced language to that effect, as follows:

"It is a defense to a prosecution under Section 501 that before the commission of the offense with which the defendant is charged, the defendant knew from other than classified information the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution."

Regrettably, it was rejected. But I think it was right. Although alone among my colleagues on the Select Committee on this issue, I have some distinguished company, and at least one surprise guest.

In 1945, Judge Learned Hand, in the *Heine* case, reversed an espionage conviction that was based solely upon evidence of clandestine transmission into Nazi Germany of publicly available information. The description of the techniques employed will sound familiar if transposed from gathering unclassified data about U.S. defense production to gathering and collating unclassified data about the names of agents.

"This material he condensed and arranged in his reports, so as to disclose in compressed form the kinds and numbers of planes—military and commercial—which were being produced and which it was proposed to produce; the location and capacity of the factories; the number of their employees; and everything else, of which he could get hold, that would contribute to as full a conspectus as possible of the airplane industry. All of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it, * * *."

Hand, while clearly recognizing that Heine had been acting as an agent for the Third Reich, decided that Heine's use of unclassified materials could not be prosecuted as a criminal act.

"Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission * * *.

"Whatever the wrong done * * * that motive did not make the spread of information criminal, which it would not have been criminal to spread, if he had got it fairly * * *."

Even more interesting is the position of the Department of Justice just a few months ago. At that point, Justice clearly took the position that including unclassified information would risk making any names of agents bill unconstitutional. Mr. Robert L. Keuch, the Associate Deputy Attorney General, testified that:

"(Such a proposal) marches overboldly, we think, into the difficult area of political, as opposed to scientific, 'born classified' information, in a context that

will often border on areas of important public policy debate * * *. A speaker's statements about covert activities could be punished even though they are not based on access to classified information, do not use inside methodology acquired by the speaker in government service, and are unembued with any special authority from former government service * * *."

The Department of Justice was, moreover, advocating its own bill at the time, and the language is worth having a look at, since it explicitly covers classified information, only.

What has changed since Justice took this position has nothing to do with the law or with an understanding of the Constitution.

The only new factor is public and congressional anger over the intervening activities of the editor of the Covert Action Information Bulletin.

If anger is the basis for a change of heart on such a significant issue, we should think again.

Senator METZENBAUM. We now have a panel of witnesses: the Honorable Robert L. Keuch; the Honorable Frank C. Carlucci, and the Honorable Edward J. O'Malley.

I think Mr. Carlucci is to be the first witness, as I understand it.

We are very happy to have all of you with us. I would be very happy to have you identify Mr. Hitz, with his new moustache. What role are you in here, Mr. Hitz?

Mr. HITZ. I am legislative counsel for CIA, Senator Metzenbaum.

Senator METZENBAUM. OK. I know you have worn some different hats, but I did not know which one you had on today.

Mr. Silver, in what capacity are you here, sir?

Mr. SILVER. I am here as general counsel of the CIA.

Mr. STURGIS. I am Jim Sturgis, special assistant to the Assistant Director of the FBI.

Senator METZENBAUM. We are happy to have all of you with us. I will comment to you that we are running very late, as we spent so much time with Senator Chafee. I would hope not to have to continue these hearings. There is a great deal of interest in trying to conclude this subject within a 20-day period, but I want to give every witness an opportunity to be heard. So I would ask that you be relatively brief, so that we may get into some of the questions that are concerning the committee.

Mr. Carlucci, please proceed.

PANEL OF GOVERNMENT OFFICIALS:

STATEMENTS OF FRANK C. CARLUCCI, DEPUTY DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY DANIEL B. SILVER, GENERAL COUNSEL, AND FREDERICK P. HITZ, LEGISLATIVE COUNSEL; ROBERT L. KEUCH, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; EDWARD J. O'MALLEY, ASSISTANT DIRECTOR, INTELLIGENCE DIVISION, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JIM STURGIS, SPECIAL ASSISTANT TO THE ASSISTANT DIRECTOR, FBI

Mr. CARLUCCI. Thank you, Mr. Chairman.

Following your suggestion and in the interest of saving time, I would ask that my full statement be put in the record.

Senator METZENBAUM. Without objection, the statements of each of the witnesses will be included in their entirety in the record following the oral testimony.

Mr. CARLUCCI. Let me just address a couple of the points that have been raised earlier today and look at them from the CIA perspective.

I think everybody is agreed on the need for some action in this area. The CIA has been troubled by this problem for some time. We have in the agency many dedicated people who are prepared to accept the normal risks inherent in their jobs, but they really feel quite deceived by the activities of this coterie of Americans who have an avowed purpose of destroying the Agency. They find it very puzzling that the U.S. Government has not been able to deal with this question. It has not only an impact on them professionally, putting them and their families in danger, but it has a very serious impact on their sources of information.

There is nothing so important to an intelligence organization as secrecy. People will not give you information if they do not think that information and their identity is going to be kept confidential. As they see list after list of CIA people and agents roll out, they say to us, "How in the world can you possibly protect us, if you cannot protect your own people from disclosure?" Similarly, cooperating services around the world say, "How can you protect the information that you give us if you cannot even keep confidential the names of your own people?"

There has been some discussion today, Mr. Chairman, of how much of the information that is used by people who reveal the names of CIA personnel and agents is publicly available.

Senator METZENBAUM. Let me interrupt you just a moment. To each of the witnesses, I do not think you have to convince this committee that we need legislation or that there are problems. I think the issue to which we are addressing ourselves in the main has to do with the extension of the language to those who are not engaged in activities like those of Mr. Agee and Mr. Wolf. I think that the concern we have is the applicability of the legislation to normal investigative and reportorial activities of people in the media. I think we are concerned about the matter of making illegal the publication of unclassified information.

So I would ask each of you not to just repeat the fact that there is a problem. We know there is a problem. What we are dealing with is a smaller portion of the issue that has to do with the language of the legislation and how you go about achieving the objectives of the legislation.

Mr. CARLUCCI. We share your sentiments there, Mr. Chairman. We are not looking for any Official Secrets Act, any blanket kind of legislation. We in the agency fully support legislation that is narrowly drawn to deal with a specific problem, namely, the practice of revealing the names of our CIA personnel and our agents.

And I recognize that everybody supports legislation, but we all want legislation that deals effectively with the problem, as well as legislation that does not infringe on first amendment rights.

I will defer to the Justice Department on the constitutional issues, but let me say a word about some of the questions that were raised by Congressman Aspin with regard to publicly available information and cover.

There is no single source that one can go to to find out—that is, single, unclassified source—to find out the names of CIA personnel.

There are, however, well-developed techniques, techniques that have been made available by some faithless former employees, techniques that very much resemble counterintelligence activities that would be carried on by a hostile service.

Now, we have no information on how the perpetrators of this activity go about gathering their information. We can only speculate.

Senator METZENBAUM. Mr. Carlucci, I was told yesterday in preparing for this hearing that up until some recent period, it was rather simple to determine who a CIA agent was, because the designation in the State Department offices was "FSR" instead of "FSO."

Mr. CARLUCCI. FSR, Mr. Chairman, is a rather broad category. There are two types of Foreign Service officers. There are the career Foreign Service officers, who go in at the entry level and move up—I myself am one. And there are Foreign Service reserve officers, who are people who are brought in for a special purpose. They may be mining engineers or petroleum engineers, they may be medical people, who are given the FSR designation.

So it is not correct to say that you can single out CIA people simply by looking at the FSR designation. It is correct, however, to say that using certain well-developed techniques, people can surmise, they can glean from some documents that were previously available and are no longer available, or even some documents that may still be available today, they can speculate on the names of CIA personnel. They do not do this with 100-percent accuracy. We are working very closely with the State Department to tighten up on any telltale signs. We are working to improve our cover. I have had a session, an executive session, with the Senate committee, jointly with the State Department, on the cover issue. It is not something I can discuss, obviously, in a public session. But let me make this point. Cover is not absolute. Any time a man becomes operational, he compromises his cover in some way. There is no perfect cover. Furthermore, the only purpose of cover is not to protect the names of our people from the KGB, as some people assume. Cover is used to give our people access to certain targets. It is used even when the host government knows we have people in the country. It is used to allow them plausible denial, if you will. And finally, it is used to protect our people from the kinds of terrorist attacks that have already been mentioned in this hearing.

So what we are dealing with is not a group of people who simply go around and pick up documents and glean the names of people from these documents. We are dealing with people who have developed highly sophisticated counterintelligence techniques. Their own publications indicate that their sources are not published documents.

We have made available to the committee one of their publications, "Dirty Work 2," where they say themselves, in some cases Department of State sources, Dar Es Salaam Embassy source, Dar Es Salaam diplomatic and counselor list. They cite different sources for their information. For all we know, they may be conducting physical surveillance. Is physical surveillance of the movement of our people publicly available information? Is idle gossip at a cocktail party which might be revealing publicly available information? I submit that it is not.

What we have here is a very deliberate and sophisticated effort to penetrate our cover, and no matter how good our cover is, I would

speculate that this kind of effort would continue. They do not just publish the names of our people, Mr. Chairman. I was Ambassador to Portugal when Phillip Agee made one of his so-called revelations. He published the names of a number of people in the Embassy, some accurate, some not. But in addition to names, he gave telephone numbers, license plates, the make of the car, addresses, and went so far to say——

Senator METZENBAUM. Mr. Carlucci, you are doing what I do not want you to do, and that is, you are falling into the arena of just going on about the problem. We agree there is a problem. We want to help you. But what you are doing is not testifying to the concerns that this committee has. This committee is supportive of the legislation but has problems with some of the specifics of it, and you are not addressing yourself to that.

Mr. CARLUCCI. Mr. Chairman, you raised the question of publicly available information. I was trying to address the question of publicly available information.

Senator METZENBAUM. Well, are you saying that if a newspaper reporter goes to a cocktail party and concludes from that cocktail party that somebody is a member of the CIA and writes a story about it, that that is——

Mr. CARLUCCI. No, no.

Senator METZENBAUM. Well, I do not know what you were saying about going to a cocktail party.

Mr. CARLUCCI. I am saying that there is a certain group that has engaged in what is essentially a counterintelligence effort against the Central Intelligence Agency, and that they are using all possible sources to pick up their information. I am sure they have a substantial data base by now.

Senator METZENBAUM. That is part and parcel of your business, that is, you have intelligence, and you have counterintelligence.

Mr. CARLUCCI. Yes, but we really do not expect it from our own people, Mr. Chairman. That is the whole point.

Senator METZENBAUM. All right. The question, then, is why is it necessary to prosecute an individual who has gathered information that you yourself or others in the Government have already revealed and put into the public domain?

Mr. CARLUCCI. We have not put it into the public domain, Mr. Chairman. That is precisely the point I am trying to make. If our people are in an Embassy and they are on a diplomatic list, you can say yes, their names are in the public domain, but they cannot be identified as CIA people without some extra effort and without using some sophisticated techniques. So it is not in the public domain——

Senator METZENBAUM. Therefore, that would be classified information.

Mr. CARLUCCI. Well, the diplomatic list is not classified.

Senator METZENBAUM. Well, just being on the diplomatic list does not make you a CIA agent.

Mr. CARLUCCI. That is correct.

Senator METZENBAUM. So you would have to have something over and beyond that in order to know what we are talking about, vis-a-vis the question of——

Mr. CARLUCCI. You can use certain techniques by following a person's career pattern. You can pick up information in various ways

in different countries. I really do not think it is appropriate for me in a public forum to go into all the counterintelligence techniques that can be used. But there are ways that one can glean this information—not with 100 percent accuracy, but with enough accuracy to do very substantial damage to our intelligence collecting capability.

Senator METZENBAUM. Mr. Carlucci, you testified that: It is only because of the disclosure of sensitive information, based on privileged access and made by faithless Government employees with the purpose of damaging U.S. intelligence efforts, that the public has become aware of indicators in these documents that can sometimes be used to distinguish CIA officers. That was your testimony of June 24.

Doesn't this indicate that the root of the identities problem is faithless Government employees and leaks of sensitive information, not private citizens and reporters?

Mr. CARLUCCI. It indicates, Mr. Chairman, that the problem had its inception with faithless Government employees who went public with the names of CIA personnel, the most prominent of whom, of course, is Phillip Agee. But since then, this kind of activity has been picked up by a number of people who are not former Government employees and has been carried out in a very sophisticated way, in a systematic way, using techniques that they may well have learned—I do not know, I assume that they may well have learned—from these faithless Government employees.

They have an article here by John Marks, entitled, "How to Spot a Spook," which lists all the techniques. So they can start out with the knowledge imparted to them by faithless Government employees, but picking up on that, they are conducting a pattern of activities designed to expose our people.

Senator METZENBAUM. Well, John Marks was a former State Department employee, wasn't he?

Mr. CARLUCCI. Yes, but he had access to classified information. State Department people, of course, have a lot of knowledge of how our people operate.

Senator METZENBAUM. And he would have been covered by (a) or (b) of the bill, and you do not need section (c) for him, do you?

Mr. CARLUCCI. That is correct, but the point I am making, Mr. Chairman, is that the techniques that John Marks published—John Marks, Phillip Agee, and others—have been picked up by people who are not former Government employees, and they are now the principal problem. What happened in Jamaica did not arise from the activities of a former Government employee. It arose from the activities of someone who was not a Government employee, and it is precisely this kind of activity that we need to prevent if the legislation is to be effective.

Senator METZENBAUM. Well, I think that we all intend to have legislation which would protect against the kinds of activities that occurred in Jamaica and other places where there have been killings and there have been problems. The problem is: How can we draft the legislation in such a way that we do not go beyond the appropriate safeguards?

Now, in your testimony, you explain that the bill is constitutional because—and I quote: "The activities that these bills attempt to deal

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with are a systematic, purposeful job of uncovering identities and are conducted with a clear understanding evidenced by an express intent that their effect will be to impair or impede legitimate U.S. intelligence activities."

Now, as previous testimony has already indicated, that is not actually correct, since the bill does not require an express intent but only reason to believe. That is a big difference, isn't it, since reason to believe does not involve proof of any intention at all, or even actual knowledge that disclosure will harm intelligence activities.

Would the Department support a change in this bill to the language that was in the House bill, as I understand it.

Mr. CARLUCCI. Mr. Chairman, we fully support the Senate bill. We think that that is a reasonable and effective approach to resolving the problem.

Our original position—the Agency's original position—did have an intent clause in it, but we have deferred to the Department of Justice, and we are fully satisfied with the formulation that has been set forth by Senator Chafee—a pattern of activities with reason to believe they would impair or impede intelligence activities of the United States.

Senator METZENBAUM. But your own testimony indicates that you ought to have an express intent. That is your testimony today, as I understand it.

Mr. CARLUCCI. Well, Mr. Chairman, that is a typing error, and I would like to correct that. I would like to correct that, Mr. Chairman. We do not think express intent is necessary under the Senate formulation.

Senator METZENBAUM. Certainly you can correct your testimony, but it is not a matter of correcting the testimony. It is a change of position.

Mr. CARLUCCI. No, it is not, sir.

Senator METZENBAUM. Well, it certainly is a change in position, because reason to believe that there is intent is certainly something different than express intent. Now, how can you say that is not a change of position?

Mr. CARLUCCI. We did alter our position some months ago to favor the Justice formulation. But we do support S. 2216, which does not have intent expressly written into it.

Senator METZENBAUM. Well, I think our time is running out. Let us hear from you, Mr. Keuch.

Also, Senator Simpson, please feel free to come in at any point that you care to. We are happy to have you with us.

Senator SIMPSON. Thank you very much, Senator Metzenbaum. I had just one question in that area, since you were discussing the sensitive issue of the first amendment, if I am not mistaken, as I entered.

It is my understanding in the legislation, and I have been involved with an amendment—I will not go into any chest thumping or anything of that nature with regard to it—but it is an issue that has intrigued me greatly, and I think we must correct it, and we must also be wary of infringing upon the first amendment.

But in those instances where prosecution is sought against a third party who published such a disclosure, it is, under the Senate legislation, necessary for the Government to prove a premeditated intent to impair or impede the Federal law enforcement or intellectual functions of the Government. And I think that that requirement

establishes—the word knowledge establishes that that intent presents and gives us protection with those first amendment provisions which I think are so necessary to protect the news media in the legitimate conduct of their constitutionally guaranteed function. But I want to be certain that you feel that the Senate legislation has sufficient safeguards in your view to protect the first amendment rights of the legitimate newsgathering agencies of this country.

Mr. CARLUCCI. Senator Simpson, I do, but I should indicate to you that I am not a constitutional authority. But my own feeling is that it is very narrowly crafted, with a substantial threshold of proof, and it is designed to get at a very small group, conducting a deliberate activity which is harmful to the security interests of our country.

Senator SIMPSON. I, like Senator Metzenbaum, spent some time in the State legislature before I came here, and one of the great arguments of all time was any time somebody was on the other side, they said it was unconstitutional. They always took that route. So it is one that I have always been wary of because it is so nebulous. And there is a court out there to decide that, and not here.

So, thank you.

Senator METZENBAUM. Mr. Keuch?

Mr. KEUCH. Senators, as I indicate in my prepared statement, the Department of Justice believes that S. 2216 not only satisfies the constitutional and other objections we raise, but otherwise satisfies applicable constitutional standards.

The constitutional objections that have been raised in the proposed legislation center mainly on section 501(c). I would like to discuss that section very briefly, since my comments concerning its constitutionality apply, of course, with special force to the other provisions of the legislation before us.

Section 501(c) requires the Government prove the defendant made his disclosure in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States and, of course, with the knowledge that the information that he discloses would disclose the covert agent, and with the knowledge that the U.S. Government has taken steps to protect that identity.

These requirements substantially narrow the coverage of 501(c) and reflect the judgment that general public discussion of intelligence activities is desirable, and that any new prohibition in this field must be narrowly drawn to preserve that general interest against unnecessary encroachment. In accordance with that principle, 501(c) does not seek to prohibit discussion generally, but is directed at the individual or individuals who take it upon themselves to bring intelligence activity to a halt, and it does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent the intelligence functions will be disrupted by the disclosure itself.

The Supreme Court has, of course, consistently held that the Nation has interests that can justify prohibitions against some kinds of speech in some circumstances. In particular, the Court has held that the Nation has a compelling interest in erecting and maintaining

effective systems of national defense, including intelligence systems; and the Court has upheld prohibitions against unbridled speech that threatens necessary defense or intelligence systems in a direct and immediate way. I refer the committee to *Debs* and *Snepp*, among other cases.

The prohibition in 501(c) requires proof that the intelligence identity in question was classified and that the defendant knew that the Government was attempting to keep the identity secret. It thereby avoids a criticism that some judges and others have directed at other statutes in this field—statutes that do not expressly confine their strictures to cases in which there is an actual occasion for secrecy.

I cite the opinion of Judge Hand in *United States* v. *Heine*. Yet the essence of the offense is the defendant's attempt to create, through private speech, a direct and immediate obstruction to a necessary defense process.

Now, one could persuasively argue that in a particular case, there may be a legitimate individual interest in engaging in an enterprise of that sort. But in assessing the constitutional balance between that interest and the compelling national interest in maintaining an effective intelligence system, we cannot conclude that there is no instance whatever in which the Government can make such an enterprise unlawful.

As I note in my prepared testimony, S. 2216 incorporates a number of recommended changes designed to make clear the narrow scope of the prohibition and to prevent the prohibition from chilling bona fide debate over intelligence policy and practice. It is our view that the bill, as amended, strikes a proper constitutional balance among the competing interests involved. It is our view that the proposed legislation is constitutional.

Mr. Chairman, I will submit the rest of my comments in my prepared statement and will, of course, attempt to answer any questions.

Senator METZENBAUM. Thank you very much, Mr. Keuch.

You certainly addressed yourself to the constitutional issues. It is my understanding that Mr. Floyd Abrams testified at an earlier hearing and cited six Supreme Court decisions that gave him cause for concern. He will be testifying later in the morning. I am frank to say I have not read his testimony.

Have you had an opportunity to examine those cases to test the validity of his observations vis-a-vis the constitutional question raised in those six cases?

Mr. KEUCH. Mr. Abrams' testimony was certainly considered by the Department of Justice, Senator. Following both our appearances before the House Committee on Intelligence at the initial stages of consideration of this legislation, I was asked by the committee to provide specific comments on Mr. Abrams' testimony. I did so in a June 18 letter to Congressman Murphy. I would like to make a copy of that letter available to the committee. I am sorry I do not have a clean copy, but I will make it available this afternoon or tomorrow morning.

But very specifically, Mr. Abrams' testimony has been taken into consideration. Of course, in the area of constitutional law, like any other area of law, reasonable minds can differ.

It is the conclusion of the Department of Justice that this legislation as proposed meets constitutional standards.

Senator METZENBAUM. Do you have a copy of the letter there?

Mr. KEUCH. Yes, sir, I do, but I am afraid it is not a clean copy.

[The letter referred to above appears in the appendix.]

Senator METZENBAUM. Well, let us at least peruse it, because we may have some questions for you before you conclude your testimony.

My staff tells me that you told the House committee that a single disclosure is subject to prosecution if part of an extended investigation. Would that still be your testimony today?

Mr. KEUCH. I do not believe I said that, Senator. I think I had indicated that a single disclosure of a name of a covert agent could meet the statutory standard if the other activities engaged in met the standard of a pattern of activities intended to expose and disclose covert agents, et cetera, et cetera. My point was that you did not have to have a situation solely to meet the standard of the statute that involved the disclosure of 50 names, and you had to wait until the 50th name was disclosed before you could bring an action. There are other activities that might come short of that, but would definitely meet the statutory standards, and that is all I was attempting to say in my House testimony.

Senator METZENBAUM. As I understand it, then, you are saying that if there has been an extended investigation, and it leads to a disclosure with respect to Hussein or someone else, or an assassination attempt, and there is one disclosure, that that would be prosecutable.

Mr. KEUCH. No, sir, I do not believe so. I think the pattern of activities must be a pattern of activities intended to disclose and expose covert agents. I think that the legislation is carefully drawn, I think it attempts to exclude the very situation that you are discussing, and that is the one case, the one newspaper article, the one egregious situaion, and the rest. I think that the pattern of activities has to meet a very strict statutory standard.

All I was trying to say in my House testimony was that those activities do not necessarily have to be seriatum disclosure of agents. We do not have to wait until we have been bitten 25 times or 15 times by the type of egregious disclosures we are talking about before we can take action, nor do I think we should have to wait.

Senator METZENBAUM. On page 5, you quote your earlier testimony that the former bill's language on intent would allow a defendant to offer the defense that the purpose of the disclosure was reform of intelligence policy or to point out an unwise or illegal intelligence policy. Your testimony seems to imply that that is undesirable. Is that correct?

Mr. KEUCH. No, sir, I do not think it is undesirable to question the wisdom of a program, or policy, or the illegality of it. What I have tried to state throughout my testimony, as Senator Chafee said, is that there are simply other ways to do that in the marketplace, in the proper oversight committees, et cetera, without revealing, again seriatum, a list of covert agents.

What I am simply trying to say is that there is no need to criticize the CIA operations using the members of the clergy, using the members of the press, using university professors, et cetera, by identifying people as CIA agents. You can have that debate. You can discuss

whether or not that is proper, whether it is wise, whether it is legal or illegal, without naming 15 people who, when they did that, when they undertook those activities, thought they were serving their country, were told they were serving their country, putting their lives in jeopardy, putting serious intelligence operations in jeopardy, and hurting our intelligence efforts. The debate can go on without the release of these names. If combination is necessary, if those names become relevant and very relevant to the discussion, then the oversight committees sit. And I am afraid I do not share the pessimism of Congressman Aspin. I think those committees have done an excellent job. I have been called up here because of a comment in a newspaper, or a comment on the street, et cetera, about what might have gone on in the intelligence agencies too often to think that those oversight committees are not doing an extremely effective job. But that is a path that is open. In the executive branch, there is the Intelligence Oversight Board that sits, and complaints can be taken to that Board. And even to the other end, there are ways in which, under the Executive order for classified information, an individual citizen or reporter can ask that information be declassified for the purposes.

But my point is the debate on whether or not our intelligence programs and policies are wise or illegal can be carried out in the main without the release of a great number of names.

I had rather broad supervisory responsibilities in investigations over the Chile matter that led to at least one criminal prosecution and a number of other criminal prosecutive memoranda, and yet we had to dismiss a case in the Chile situation years later; despite all the talk, despite all the Senate hearings, despite all the news reporting on it, we had to dismiss a case to protect sources and methods. My point is that that public debate went on without any need to list the names of 50 covert agents.

Senator METZENBAUM. Isn't that precisely the kind of defense that it is all right to criticize, but not to name a name?

Mr. KEUCH. I think that is part of the point of this bill, if you do it when you meet the other statutory standards.

Senator METZENBAUM. Isn't that precisely the kind of defense that the Senate Intelligence Committee reports says should be allowed, when it indicates on pages 18 and 22 to 23 that disclosures for such purposes are proper? Isn't that how the report distinguishes between the "Covert Action Information Bulletin" and the New York Times?

Mr. KEUCH. I think what they are trying to do, Senator, is make a distinction between the individuals who do this as part of a pattern of activity. I think that is quite proper. My testimony says that, too. We are trying to draw this legislation with a very fine line. We are not trying to reach the responsible reporter in your example, the King Hussein story, or an assassination story, et cetera. It is the individuals who practice a pattern of activities. But if the question is, must you make those disclosures in order to permit public debate, I just do not think that is a sincere argument. I think you can have the public debate, you can question our policies and the legality and the wisdom of them, without having to put a number of people, who also think they are serving their country very well, putting their lives and their families' lives in jeopardy.

Senator METZENBAUM. Well, is the Department saying that a journalist engaged in a legitimate news reporting activity, who discloses an identity, is intending to report the news and not to name the names, and so is not covered by 501(c)?

Mr. KEUCH. I think the legislation with the pattern of activities language is trying to meet what we are all trying to do—that is, reach those individuals who are engaged in a pattern of activities disclosing covert agents—not to reach the responsible reporter who writes the one article, who writes the one story, or the rest. And I think my answer to your question in that context would have to be—I am sorry whether it is yes or no, I am sorry—the point is, we are not trying to reach the individual responsible reporter who is writing the one news story.

Senator METZENBAUM. What if it is a series of news stories, and it leads up to the disclosure of the name of King Hussein, because the name of King Hussein itself was news. It was far more newsworthy than naming a professor who was a CIA agent. Wouldn't the reporter have to do that, and wouldn't he then be subject to prosecution?

Mr. KEUCH. I do not think that an investigation or a series of articles leading up to the disclosure of one individual CIA asset or source meets the statutory standard of a pattern of activities intended to expose and disclose covert agents.

I think it is also clear—I realize, in the statutory interpretation, you go to the plain language of the statute itself—but the legislative history, the development of the terminology in this statute, there is simply no way that individual could be prosecuted.

Senator METZENBAUM. I understand you support the language that there is "reason to believe" there instead of "specific intent." Put aside this bill. Do you think we ought to put that into all legislative proposals or statutes that have the word, "intent," and that we ought to now change the standards in the law? Do you know of any other place where we have such language in the law?

Mr. KEUCH. I do not think we should put it in every piece of legislation, because every piece of legislation involves balancing of different types of interests. I know one place where that language occurs, and that is in the most serious espionage statutes on the books. Also, 18 U.S.C. 794 makes it a crime to disclose national defense information to a foreign government with the intent to act against the interests of the United States, or to help a foreign government, or with reason to believe it is disclosure——

Senator METZENBAUM. Is that the language of that statute?

Mr. KEUCH. Yes, sir, it is also in section 793. And one of the earliest espionage cases I considered, Senator, was a Marine officer or an Army officer, who felt that we were so far behind the Soviets in our missile preparation and our missile program that we were losing the arms race, and our national defense was suffering. He went public with a tremendous amount of guided missile information, numbers we had, where they were stored, and the rest, and his only intent was to bring to the Congress and to the public what he considered the sad state of our missile preparation so that we could have a stronger national defense.

Now, I think he did egregious harm to the national defense by disclosing that national defense information. He was and is covered by 18 U.S.C. 794, the classic espionage statute.

And I think one of the questions you asked was: Does the reason to believe language make this an easier statute to prosecute? The answer to that is absolutely. But I think our purpose here is to draft not just a statute, but to enact an effective statute.

And if you have the actual intent to impair or impede, you have first the problem I just indicated. You are going into the individual's motives. And, as Ambassador Carlucci and others have pointed out, the people who are disclosing these lists seriatum are saying they are doing it for the best motives possible, to help our intelligence operation. If we had the specific intent requirement, this statute would be a nullity.

We have also testified at great length, on at least four or five of my appearances, that that intent requirement raises serious constitutional questions in the minds of the Department of Justice. We looked at that very carefully, and we decided that what it would do would be to chill public debate and chill public discussion, because you would take the two individuals who are making disclosures, and the individual who has been supportive of the intelligence programs, supportive of the administration, supportive of intelligence operations, et cetera, would probably not seem to have that intent when he makes disclosure. The individual who has always been critical of those programs of the intelligence agencies and the rest would seem to have that necessary intent. But that would mean that the individual who has been critical would be more chilled in what he was going to say in making disclosures than the individual who has been supportive.

We think that raises very serious constitutional questions. The Senate committee has responded to those constitutional arguments with the present formulation, and we think that is a wise choice.

There is, of course, one other problem——

Senator METZENBAUM. Did the Department of Justice support the House bill?

Mr. KEUCH. No; we had very deep constitutional concerns with the House bill. As I testified before the House, we think that one of the areas of constitutional law that is very open at the moment is how you judge the constitutionality of a statute that can have both constitutional applications and overbroad unconstitutional applications. There has been a shift in the Supreme Court in that area of the law—*Broderick* v. *Oklahoma*, which I quoted, I think, in my statement, or at least, certainly, in my House testimony, puts some uncertainty in that, so we are definitely not sure. We have serious concerns about the constitutionality of the House version. We far prefer the Senate version, for all the reasons I have testified to.

Senator METZENBAUM. I think you have covered this, but I am not sure you have. That is, whether the reason to believe language will not have a far greater chilling effect than a requirement to show specific intent. It is such loose language.

Mr. KEUCH. I do not think it is loose language at all, Senator. If it is loose language, again, it is in the classic espionage statute.

Senator METZENBAUM. How many convictions have we had under that classic language?

Mr. KEUCH. Quite a number. I am not talking about the leak cases. I am talking about classic espionage situations.

Senator METZENBAUM. Do you think that those came about because you had the reason to believe language in there?

Mr. KEUCH. Yes, sir. In part, many of them did. Certainly, the Soviet agent we arrest, who is clearly a Soviet agent, we suppose that proving that intent would be easier. But again, the example of the case I mentioned, the gentleman who gave up a great deal of highly classified information on our missile program for the best of all possible purposes. The people who are publishing lists of CIA agents today, putting people's lives in jeopardy, affecting our intelligence programs, are doing so, they say, for the best of all possible purposes, to make more efficient our intelligence programs, to get us out of what they consider to be an unnecessary activity.

I have testified over and over again that the specific intent requirement does raise very serious constitutional questions.

There is another aspect of the problem, and that is what we have been commonly referring to as the gray mail problem. One of the great benefits of this narrow statute in this area would be that we would avoid a great number of gray mail attempts, that is, the individual who says: In order to go forward with my defense in this case, I need a great deal of classified information out of your files, Mr. Government, so you must pay one heck of a price to prosecute me. I will make you harm the national defense in order to protect the national defense by bringing this prosecution.

Under the subjective intent statute, as is presently in the House bill, as I have testified over and over again, that gray mail argument, we think, is helped substantially. The individual would have to say that to prove that his intent was proper, that he was trying only to help us, trying to get us out of activities that were not effective, not efficient, were creating problems in countries, et cetera, that he needed a great deal of information out of the files of the Government on our other intelligence operations and programs. We simply could not pay that price to bring a prosecution.

And again, I think our purpose is not only to draft a constitutional statute, but an effective one.

Senator METZENBAUM. The letter that you sent to Congressman Murphy, I am told, does not address those six cases——

Mr. KEUCH. Senator, roman numeral II of the letter discusses 501(b), which was comparable—I am sorry, that was an earlier draft—it was comparable to the present 501(c). Mr. Abrams, I think, has referred to the same cases in each appearance before the various committees. I was attempting to meet his arguments.

I can only say to you that those cases were considered. We have cited cases of our own. It remains the firm view of the Department of Justice that this formulation is constitutional.

Senator METZENBAUM. My question to you was: Have you made an analysis of the cases he has cited. Those cases are: *Houchins* v. *KQED*, *Smith* v. *Daily Mail Publishing Co.*, *Landmark Communications, Inc.* v. *Virginia*, *Oklahoma Publishing Co.* v. *District Court*, and *Cox Broadcasting Corp.* v. *Cohn*——

Mr. KEUCH. And I thought my response was that we have certainly looked at those cases, as part of the constitutional consideration of

the Department of Justice, and I am sure Mr. Abrams has looked at my case. And again, constitutional law is a very fascinating area for attorneys, and all I can say is that we have looked at this matter in great depth in the Department of Justice. We have not taken this process lightly. We have been involved in this process for a period of 9 months and have testified consistently on this issue. And it is our conclusion, after consideration of Mr. Abrams cases and all the cases we can find in this area, that this statute passes constitutional muster. I do not think I can be more specific than that, Senator.

Senator METZENBAUM. Well, you and I are both lawyers, we have both practiced law. We both know that it is not at all unusual where somebody cites a specific series of cases to respond to those. Yours is a very perfunctory response in paragraph II, consisting of two paragraphs.

It would be helpful to the committee if the Department would be good enough to respond specifically to the legal aspects and the constitutional questions involved in those six cases, and I would ask you to have the Department do that, please.

Mr. KEUCH. Senator, we will certainly look at those cases again, but let me say again that I think that those cases were part of our considerations, and we reached the conclusion we did only after deep consideration of the constitutional issues.

I will certainly read Mr. Abrams' cases again——

Senator METZENBAUM. Well, I am not asking you to read them at this point. I am asking you to have the Department respond promptly, so that when this matter comes to committee for markup, I will have your response.

Mr. KEUCH. I will be happy to respond, Senator. It will not change, because our response is my testimony, and my testimony was not drafted without consideration of all those cases. But I will be happy to respond.

Senator METZENBAUM. I know the committee has a lot of confidence in the Department of Justice, and we will be very interested in your analysis of each of those cases.

Mr. O'Malley, we will be happy to hear from you, sir.

Mr. O'MALLEY. Thank you very much, sir. With your approval, I would also like to request that my statement be admitted into the record. I would also like to comment generally that the FBI supports this bill, and I can assure you that Judge Webster, if the purpose of this bill is to stifle legitimate debate, would not support it.

Rather, we think that the objective is to protect our intelligence activities from those who would, as I say in my statement, destroy those intelligence activities.

As you are aware, there are certain assets of the FBI and agents of ours who travel abroad in a covert capacity that we think should be protected by this bill and are so included at the present time.

Those assets that I am talking about are only those that we use in the foreign intelligence, foreign counterintelligence, and foreign terrorism areas. We are not talking about any assets here who are involved in any domestic groups. We have completely excluded them from any consideration by this bill.

Why do we think that we need this type of protection for these assets? We, as does the Agency, recruit people to assist us from foreign

countries here in the United States. We also rely to a large degree on members of the émigré communities here to assist us against these hostile intelligence services. We do likewise in the foreign counterterrorism area, and when I am talking about foreign counterterrorism, I am talking about terrorist groups in the United States which are acting pursuant to the direction of foreign powers. I am talking mainly about Arab terrorist-type groups here.

When I express my concern, I think it is rather obvious, and we have extensive information that the Arab governments and/or entities abroad which control these groups operating in the United States would not hesitate for one second to exact severe retribution from any of their people who they thought might be cooperating with the FBI.

We also have substantial information regarding possible foreign services; assassinations, and attempts to assassinate those they thought or had reason to believe were now assisting Western governments. And indeed, we have information regarding the United States itself, where certain hostile services have sought to locate certain defectors in this country with the purpose being to assassinate them. So far, we have been able to prevent such attempts.

This generally is why we think, and support, of course, our recommendation in this bill.

Senator METZENBAUM. Thank you, Mr. O'Malley.

Mr. O'Malley, has anybody revealed secret FBI identities?

Mr. O'MALLEY. Not to date, to my knowledge.

Senator METZENBAUM. Unlike agents abroad, aren't the FBI agents and informants serving in the United States protected by U.S. police power and other enforcement agencies?

Mr. O'MALLEY. FBI agents serving in the United States are not included in the protection of this bill. It is only those agents who travel abroad in a covert capacity.

If you are talking about assets, if we recruit a foreign national in the United States, and his identity is divulged at a press conference, there may not be sufficient time to protect that individual.

The case I was talking about before, where these hostile services were trying to locate people who had already defected, fortunately for us and everyone else concerned, they had already been afforded U.S. Government protection. I am not prepared to say that in every instance, we could guarantee similar protection to someone who has not yet openly defected from his country.

Senator METZENBAUM. Do you think the matter with respect to FBI agents might be more appropriately covered in the FBI charter legislation?

Mr. O'MALLEY. The issue of FBI agents?

Senator METZENBAUM. Well, I think the similarity——

Mr. O'MALLEY. We are only talking about FBI agents who travel abroad. The foreign issue is what we are talking about here, and that is all we are asking to be protected. I think we can protect our own agents operating inside the United States in a covert capacity.

Senator METZENBAUM. Now, the FBI counterintelligence and counterterrorism component infiltrated the Socialist Workers' Party, black student groups, investigated the Southern Christian Leadership Conference, Dr. Martin Luther King, Jr. Under this legislation, would it

have been unlawful for the groups themselves to publish the names of the covert agents involved in these activities?

Mr. O'MALLEY. These are not the type of groups that we are talking about. There is a very clear delineation between the types of groups that we are talking about now that are investigated by our intelligence division and domestic groups, which are the type that you are talking about. The only groups that we are talking about are groups in the United States, either terrorist or otherwise, in our counterintelligence area, that are clearly operating under the direction and control of a foreign power.

Senator METZENBAUM. But would it have been unlawful for the groups themselves to publish the names of the covert agents involved in those activities?

Mr. O'MALLEY. Not in those days.

Senator METZENBAUM. Under this bill, under this bill, if the same activities were going on today.

Mr. O'MALLEY. They are just not covered under this bill. These are not the types of organizations that are covered in this bill.

Senator METZENBAUM. Well, how do you make that distinction? How do you say they are not covered? What is the exclusionary language?

Mr. O'MALLEY. The language in 501(c) talks about groups which are in the practice of identifying covert agents, the intent being to impair the intelligence activities of the United States.

Senator METZENBAUM. I am sorry?

Mr. O'MALLEY. Section 501(c) describes the type of group that is in the business or practice of identifying covert agents with the intent to impair intelligence activities in the United States.

Mr. KEUCH. If Mr. O'Malley would yield for a moment, also, Senator, the definition of covert agent in 506(b) says that: "at the time of the disclosure, acting as an agent or informant to the foreign counterintelligence or foreign counterterrorism component of the FBI." That would be limited to those organizations that were being investigated that met the criteria of the Attorney General's foreign counterintelligence guidelines. The types of domestic groups that you were citing in your question simply would not be covered, because they would not fall into the definition of covert agent.

I also agree with Mr. O'Malley's answer, too, that——

Senator METZENBAUM. Slow down, slow down, you are rolling a little rapidly. Let us just go back. Let us assume that the FBI infiltrated Operation PUSH, which has taken $10,000 or more from the Saudis, as I recollect. And let us assume that they are involved in some kind of foreign intelligence activities—I do not know that they are, and I am not suggesting that they are. Now, wouldn't this legislation be applicable if the Operation PUSH——

Mr. KEUCH. No, sir.

Mr. O'MALLEY. No, sir, it would not be applicable. And again, as Mr. Keuch says, there is a clear delineation between that type of a group—and I am not saying we have penetrated, or anything else, but for the sake of your example—there is a clear delineation not only within the FBI, but within the Department of Justice guidelines under which we operate and under which there has been set up the Office of Intelligence Policy and Review at the Department, that works

very, very closely with us to make sure that there is no mixing between the two types of groups that we are talking about. And there are also the two congressional Oversight Committees.

Senator METZENBAUM. Mr. O'Malley, you are saying that is the case, but we know, and the FBI has done an excellent job in taking a mea culpa plea that they have been involved in such activities in the past.

Now, you have said that the language of this legislation is not applicable because it only has to do with foreign intelligence under 501(c). But my question is: What if you concluded that that was part of the foreign intelligence investigatory activity?

Mr. O'MALLEY. The FBI, Senator, cannot make that independent conclusion. You would have to justify that with the Department of Justice.

Senator METZENBAUM. But you are telling me what you would do. I am asking you about the legislation. You are telling me we would not do it, because we are not permitted to do it, and it is not within our jurisdiction, and they do it, and we do not.

Mr. O'MALLEY. That is right.

Senator METZENBAUM. But we are drafting a piece of legislation. And some of us think that you have done some things in the past that you should not have done—and I am not blaming you for that, but no less a person than William Webster has indicated that. Now, the next Director may decide to go beyond the proper limit.

Mr. O'MALLEY. That is exactly what I am saying, Senator. There were things that you are talking about which happened in the past, and the situation as it exists today is a result of steps that have been taken to prevent those occurrences from ever happening again.

Senator METZENBAUM. Well, let me show you the definition in this bill. You are again leaning back and saying; It will not happen; trust me.

Mr. O'MALLEY. I am not saying, Trust me, Senator. I am saying the FBI no longer independently makes that judgment. We work very closely with the Department of Justice on that issue now. We also work very closely with the two Intelligence Oversight Committees. We do not make that judgment any longer.

Senator METZENBAUM. Mr. O'Malley, what I am trying to say to you, though, is this——

Mr. O'MALLEY. I understand what you are saying.

Senator METZENBAUM. You are saying; We do this. I am saying that if J. Edgar Hoover came back from the grave and took over the FBI again—he did not care what the laws of the land were. He ran his own shop. And he did not care what the Intelligence Committee of the Senate or the House had to say, because he was probably stronger than they were.

Now you are saying to me: We cannot do it, because the way we work is thus and so. I am saying to you that the definition of a covert agent that is found in 506(c) would seem to indicate that in the example that I gave you that you very well could use the language of this law to prosecute the publication by an organization of FBI infiltration of the organization such as the one that I mentioned. I do not mean by mentioning that organization to point a finger in any way or to suggest any impropriety—but the fact is, you could prosecute.

Mr. O'MALLEY. Senator, it would have to be more than just that the Bureau decided, J. Edgar Hoover or whoever, decided, that this organization was a foreign directed or controlled organization, and therefore, they infiltrated it and then there was disclosure. The statute, I think, says a foreign counterintelligence operation of the Bureau. That is an operation consistent with the Attorney General's guidelines for foreign counterintelligence operations. It would not have to be the FBI. It would have to be the Attorney General. And in truth, it would have to be the Oversight Committees of the Congress, because those guidelines are developed in consultation with those committees, are maintained with those committees, and the rest. And if the particular office of the FBI—and I am not going to say it is going to do that—goes off on a frolicking detour of its own and infiltrates an organization only because it believes subjectively that it is a foreign counterintelligence operation, that is not satisfactory. It has to be a foreign counterintelligence operation of the Bureau. I assume that means a proper counterintelligence operation for the Bureau, and that is one consistent to the Attorney General's guidelines. And again, those Attorney General guidelines are developed in conjunction and consultation with the Oversight Committees and any changes in those guidelines are promptly reported to the Oversight Committees. So if it was not a proper foreign counterintelligence investigation, this bill would not cover it, sir.

Senator METZENBAUM. Mr. Keuch, Mr. O'Malley, everything you say is fine. But assuming that John Mitchell were the Attorney General, assuming that J. Edgar Hoover were the FBI Director, and assuming that he decided to infiltrate an Arab student group, an Iranian student group, I am afraid that all of those guidelines would be swept aside. What we need concern ourselves about, and that which we are concerning ourselves about, has to do with the legislative proposal before us, not your guidelines, and not the assurances you have given us.

Mr. KEUCH. No, sir. My point is, the statute can only cover an operation and an agent within an operation if it is a proper foreign counterintelligence operation. Now, if what you mean is that future Attorney Generals and future Directors may change those guidelines, certainly they may, but they would do so and must do so with notice to the Oversight Committees of the Congress. So you would have to have a series of steps before the example you have raised would come to be.

Senator METZENBAUM. Mr. Keuch, it is very possible to have guidelines and not live up to them. This Government does it every day of the week, all over the Government.

Mr. KEUCH. Of course, sir. But my point is if they do not live up to the guidelines, you cannot use this statute to prosecute. If it is not a foreign counterintelligence operation of the FBI, sir, this definition is not applicable, and therefore, the statute is not applicable.

Senator METZENBAUM. I drew blood from my friend——

Senator SIMPSON. Howard and I rise up—he rises up when I get going and I rise up when he does. You know, one of the interesting things to me, and I share it with my good colleague, I am new here—I was elected in 1978—one of the most extraordinary things I witness around here is the digging up of old stuff. It is fascinating to watch.

And it matches horror stories, Howard, as we talked about one night together, on television, but it is more than horror stories, because when you enter the fray, then you look like you have embraced everything that J. Edgar Hoover did, and I would not embrace a lot of that stuff. and never would. I think it was a vast impingement upon civil rights and normal sensitibilities. But the point of going back to hypotheticals is what you do in the law business when you do not know what you are doing. I remember practicing law for 20 years, and when I did not know what to do with the witness, I would ask him a hypothetical, because you can get them every time on a hypothetical, because you can make it as romantic as you wish.

So I hope that we will stop the orgy of self-guilt and flagellation that comes with whatever Mitchell did or whatever Hoover did, and get down to the issue at hand today, and that is that we have the Levy guidelines—and I do not know what guidelines you are referring to when you speak of the Attorney General's guidelines; is that what you are referring to by the guidelines?

Mr. O'MALLEY. A new set has been refined and issued.

Senator SIMPSON. They have been refined indeed, because that is what we are trying to do with the FBI charter.

Mr. KEUCH. Yes, sir.

Senator SIMPSON. I hope we can come up with something, because that is something I have been working intently on. But the Levy guidelines are there. They are for our use. There is not any question about the oversight machinery that goes into effect when those guidelines are going to be impinged, or changed, or shifted in any way.

I just do not see why the FBI agents and the CIA agents of the eighties have to pay for the errors, omissions, and sins of those of the fifties and sixties. That just is not reasonable, it is not productive, it is not even fair. And so, in that situation, I would hope that we would stick with the language—when everything else fails, read the bill. And if you review the section on page 16, we omit, with this language: "who is at the time of the disclosure acting as an agent of or informant to the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation." That is what it says. And I would ask the question, if I may, and I would ask that of you, Mr. Keuch, if section 501(c) is removed from this bill, do you not agree that those who would seek to impair the legitimate intelligence gathering activities would be very little restrained in their efforts by just using (a) and (b), because——

Mr. KEUCH. Absolutely. The removal of 501(c) from the bill, I think, would make it an unnecessary exercise.

Senator SIMPSON. To me, it seems if we remove (c), we simply have the (a)'s and the (b)'s running to (c), to tell (c) what happens, so that the (a)'s and (b)'s get off the hook, and that seems goofy to me.

Mr. KEUCH. If you removed 501(c), Senator, you would not have Mr. Marks writing that article. You would have Mr. Marks giving the information to someone else to write the article, because, of course, he would fall within the prohibitions of (a) and (b), because they are people who are either Government employees or, in some other position of trust, received the information. That is right. You would not—it is true that (a) and (b) may point to the most—perhaps in my mind, because they are individuals who got information in a position of trust,

and they were doing two things. Not only are they hurting their country's national security, but they are going back on their—it is a breach of trust. Perhaps those are, in my personal view, the most egregious situations. But if you remove (c), I think you have made this exercise a nullity, because you have removed any chance of reaching the conduit for the information. And it is the conduit that is going to be in the public and is going to be making the disclosure, as is clear. That is what has been happening over the past few years.

Senator SIMPSON. I am about to run down, but I was fascinated at the relation of the testimony that will be presented, or is here, with regard to Mr. Abrams and the citation of the six cases. We are talking about an exhaustive analysis of those cases, and all I see here in his statement, and totally off-point, it just simply says that: "While Government may try to keep information secret, the disclosure of information which has already become public may not later be criminally punished." Well, who would not agree with that, but that is not what we are talking about here.

Mr. KEUCH. And of course, Senator, this bill does have a requirement that the individual, when he makes the disclosure, must know that the U.S. Government is taking steps to protect the information, and again, because of the definition, covert agent requires that the information is classified information.

And this concept of getting information of the public, and that somehow, you cannot reach into that at all—one of the examples I have used in speeches and discussions I have had is if, during a wartime period, you had a series of enemy agents sitting in New York harbor, Miami harbor, New Orleans, and San Francisco, sitting out in public view with binoculars and counting the troopships that were leaving, now, that is information in the public domain. They then call up their friend back in New York, and he sits down and makes out a cable to the enemy and says: These are the troop movements as of August 22 of this day. All that information is in the public domain. I do not think it should be protected information, protected activities.

So to just raise the red flag that this is out of the public domain is only part of the equation and only part of the question. And again, we believe that this legislation is carefully drafted. It says that the individual making the disclosure must know that the information he is about to disclose will reveal the covert agent. He must know that we are making efforts to protect that information, and the covert agent information must in fact be classified information.

Now, whether you use a rosetta stone that you have developed, through aggressive reporting or aggressive investigation, or because it has been given to you by somebody who is a disgruntled individual, willing to breach his trust and go to 17 public documents and come up with the name of a covert agent and reveal that covert agent, and, therefore, put that man or woman into jeopardy, his family into jeopardy, or if nothing else but affect our intelligence operations, I simply do not think that kind of activity is protected by the first amendment. Justice Goldberg said the Constitution is not a suicide pact, and I agree with him.

Senator SIMPSON. Well, there is always one other interesting thing that has to do with the first amendment, but you bring that up, and you may be impaled on the shaft of the media, and that is simply that

newspapers and the media are still in business, as are other businesses, to make money. And I hate to bring that up from time to time, but I always do dwell on it lightly just to say that that is the case.

Mr. KEUCH. Senator, I had negotiations with a newsman who I will not identify about a story that he said he was going to run, and I indicated that I did not know the truth of the story, I did not know the facts, and I would try to find out and tell him as much as I could. But I was concerned that if he went with the story as it was presently framed, he could put a person's life in jeopardy, someone who was a very highly placed agent. His response to me was: "Sir, you have to understand, the newspaper business is a competitive business."

Now, I am not going to say that that is every newsman I have ever dealt with. It is a very, very, very, very small percentage. But that problem does exist.

And again, I think one of the things I have not heard in the debate about the balancing act is if we are talking about balancing interest, the public interest in protecting our intelligence operations and our covert agents against the public disclosure, I think public disclosure is appropriate of unwise and illegal activities. There should be the fullest public debate about what we are doing with our intelligence operations.

The Oversight Committees of this Congress, the charter legislation, all these are attempts to struggle within our democratic system with the two needs of most open discussion of our policies and principles, and on the other hand, protecting our national security.

I have yet to hear a very solid reason saying what is the great public interest that overweighs everything else in the seriatum disclosure of individuals who are working their damnedest for their country, day after day, in conditions where most of the people who are making those disclosures would never put themselves in. I simply do not know what that public interest is.

And again, I would say the debate can be had, the criticism can be had, the disclosure of illegality can be had, and it can be done without the seriatum disclosure of individuals working for their country.

Senator SIMPSON. Well, I thank you for your testimony. You are very forceful in all the materials I have gone through and heard with my work with the FBI Charter, and I thank the majority staff and the minority staff of this committee for their assistance. Yours is the most pungent and clear—some of it has become very plastic throughout all this and is just read off—and yours has a ring to it that sounds to me like it has a great deal of experience backing it up. I thank you for it, and I thank you for your indulgence, Mr. Chairman.

I guess the final comment, without lapsing into philosophy, is that you do see some tremendously responsible members of the electronics and print media in this community; they are, indeed. However, they are just like Congressmen. Some of them are less responsible than others. They are just like lawyers, some of whom are less responsible than others. I guess I had good training before I got here. I was a lawyer, and that was described as the lowest form of human activity. Then, I got here, and there is a lower form, perhaps, and that is Congress. But it seems to me that we are missing the boat when one member of society says that they are not prey to those same type of deficiencies. And there are irresponsible members of the electronic and

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print media who injure their more responsible brethren, just as we get injured by our less responsible brethren. And when you try to draw that distinction, however, in this place, in this arena, you get into the first amendment, and you are likely to get your shorts torn off in that process.

Mr. KEUCH. Editorially, at least.

Senator SIMPSON. Yes.

Senator METZENBAUM. Thank you very much, Senator Simpson, for your comments.

I would like to ask Mr. Keuch to respond with one of his more pungent responses—generally, I am told that pungent means smelly, I do not ask it in that term, but I just was picking up Senator Simpson's statement——

Mr. KEUCH. That has been editorialized by cartoon recently, too, Senator.

Senator METZENBAUM. Now, you answered Senator Simpson, and you said in unequivocal terms that without 501(c), that this legislation would have no value; is that right?

Mr. KEUCH. Yes, sir.

Senator METZENBAUM. Then, how do you explain the fact that 3 or 4 months ago, on June 24, 1980, you testified before the Senate Select Committee on Intelligence, you presented them with a bill, and you had no 501(c) in it, and you specifically had in your bill only the requirement that the disclosure would be based on classified information. Section 502(a) of your bill says:

> Whoever having been an employee of the U.S. Government with access to information revealing the identities of covert agents, knowingly discloses information that correctly identifies another person as a covert agent or attempts to do so, is guilty of an offense.

Now, what I am saying to you is this: 4 months ago 501(c) was not that important. How do you come before us today and tell us that without it, the bill is not worth a damn?

Mr. KEUCH. I am sorry, Senator. Four months ago, we proposed a Department of Justice bill, which at that time was the administration bill. That bill did have a section that would cover individuals in the public domain. That section says whoever. It does not say whoever has received that information in a position of trust, or has access to classified information. There was a different formulation. We sought to limit the applicability of the statute by providing that the individual must know that he was disclosing classified information.

As I have explained in my testimony before the House subcommittee, two or three times, it became very clear in the various intelligence committees during the development of this legislation that the administration bill simply did not have support.

Let me again emphasize that the administration bill had a section in it that would cover anybody in the public sector. It was not limited, as (a) and (b) are, to individuals who——

Senator METZENBAUM. It was only classified information.

Mr. KEUCH. Absolutely. That was the formulation we reached.

Senator METZENBAUM. And you just said to Senator Simpson this bill is not worth anything without that section in it.

Mr. KEUCH. No, no, sir. I said 501(c) is the section that reaches the conduit. It is the section that reaches those people who were not prior

employees of the Federal Government. And when I was responding to Senator Simpson, I assumed that was his question, and that is the question I answered.

If 501(c) were taken out of this bill, then all it would reach would be former Government employees or people who had classified information who were in positions of trust. You might have those, as I said, who in my personal view are the most egregious actors in this ball game, but you would not reach the people in the public sector. The Department of Justice formulation, the administration bill, did in fact reach people in the public sector, in a different way.

Now, again, during the development of this legislation, it was clear that the Department of Justice, the administration bill, did not have the support of the Intelligence Committees, for some very well-expressed reasons, I think. After consultation within the Department and after consultation with the CIA, we talked to the staffs of the various committees—in fact, I had a joint meeting with representatives from the House Intelligence Committee staff, the Senate Intelligence Committee staff, myself, various officers in the Department of Justice—and the present formulation in S. 2216 was developed. As I have indicated in my testimony, this is another way, we think, of meeting the constitutional standards.

So it was not that I testified before that 501(c) was unimportant. What I thought Senator Simpson was asking me was the full reach of 501(c), which is intended to reach those people in the public domain. The administration bill had that. It was a different formulation.

Senator METZENBAUM. He was not asking you that at all. He was asking if this bill had any value without 501(c), and you said it would not have any value without it.

Mr. KEUCH. Of course, absolutely, sir.

Senator METZENBAUM. And yet you came before the Congress with your bill, and you did not even have anything close to that section.

Mr. KEUCH. That is not correct, Senator.

Senator METZENBAUM. Well, where do you have it? Where do you have anything in that original bill about unclassified information, except with respect to a former employee of the Government?

Mr. KEUCH. I am sorry, Senator. If you are limiting that to unclassified information, we have no dispute. All I am trying to tell you is that I assumed Senator Simpson's question was 501(c), the importance of that section—as I tried to indicate in my answer—was not about the unclassified or classified difference. It was the fact that it was the section of the bill that reached people in the public; that is, it was not limited in its terms, as (a) and (b) are, to those individuals who had positions of trust. The administration bill had a comparable section, as far as the coverage of individuals in the public domain. I quite agree with you, that that bill was based on the concept of the disclosure of classified information. That was our formulation to meet the constitutional issue.

When it became clear that bill did not have sufficient votes in the Senate or the House committees to be passed, we still felt the bill was important, and we came up with a different formulation, and that is the present formulation in 2216. That section, 501(c), also reaches the public domain.

If I misunderstood the Senator's questions, I am sorry. What I meant is that if 501(c) was eliminated from this bill, my concern would be that it would eliminate coverage of those people in the public sector, and that would make the bill, in my judgment, Senator, a nullity, because you would not be able to reach the conduits. You would only have the continual coverage of 501(a) and (b), and that simply, we do not think, is what this bill should reach.

Senator SIMPSON. Mr. Chairman, there is one person here who might clarify, and that is me. I asked the question. Let us just review the question I asked, so there will not be any confusion as to what is Simpson saying. Here is what it was: If section 501(c) is removed from the bill, do you not agree that those who seek to impair legitimate intelligence activities would be very little restrained in their efforts? That was my question.

Senator METZENBAUM. I agreed that that was the question, and his answer was yes. And I am saying that when he first appeared before the Congress, he did not have anything close to 501(c) in the bill.

Mr. KEUCH. I am sorry, Senator, I did.

Senator METZENBAUM. Well, where is it?

Mr. KEUCH. Senator, I will have to get it. This bill has been through so many versions. I am telling you that the Department of Justice bill——

Senator METZENBAUM. I am not saying 501(c) is wrong.

Mr. KEUCH. I am not either.

Senator METZENBAUM. All I am saying is that your position has changed, and your response to Senator Simpson is an indication that the bill has to have that section in it, and yet, when you came to Congress originally, you did not have it in, because you did not have anything in about unclassified information except with respect to agents of the Government.

Mr. KEUCH. Senator, it is the old debate issue. If I let you form the issues that we are going to debate on, you are going to win. I did not say a word about—in answer to Senator Simpson's question—I did not take his question of classified or unclassified.

The importance of classified and unclassified is they are two different formulations of reaching the same result—that is, reaching those people in the public domain. The Department of Justice/administration bill, section 802(b)—the only thing I do not have is 802(b), and I will provide it for the committee I am sorry, it is 801(a)—it says: 'Whoever knowingly discloses information that correctly identifies another person as a covert agent * * *." Now, it goes on to say and I agree with you that that information must be classified information.

Senator METZENBAUM. That is right.

Mr. KEUCH. My response to Senator Simpson's question was based on the concept that if you take away from this bill any provision reaching those individuals in the public domain—that is, those individuals who have not obtained the information in a position of trust, as 501 (a) and (b) do—that the bill would be a nullity.

The Department of Justice formulation, the administration bill, is one of the ways we thought it was possible to meet the constitutional problems in this area. Again, that did not have sufficient support in the House and Senate committees, and we then drafted what is now

S. 2216, which again, we feel, is a different way, but is a way of meeting constitutional concerns.

I do not think I have changed my position, Senator, except that we have changed the formulation.

Senator METZENBAUM. With respect to classified as against unclassified information: Have you changed your position on that?

Mr. KEUCH. Absolutely, Senator. That was not the question Senator Simpson asked.

What we have done is changed the formulation of the two bills. The earlier versions of the bill did not have all the limitations that this bill now has. It does not have the pattern of activities language, it does not have the fact that the individual knew about that we are taking steps to protect, a number of things.

We felt that this formulation is equally a constitutional way to meet the problem. We certainly felt the Department of Justice formulation was constitutional, or we would not have submitted it to the Congresss, Senator. And certainly we have changed formulations.

But Senator Simpson's question, I thought, asked me whether 501 (c) was necessary. My answer to that question is yes, and it remains yes. And I do not think that is a change in my position.

Senator METZENBAUM. Thank you very much, members of the panel.

[The prepared statements of Messrs. Carlucci, Keuch, and O'Malley follow:]

PREPARED STATEMENT OF FRANK C. CARLUCCI

I want to thank you and the other distinguished Members of this Committee for the opportunity to discuss legislation which I consider to be urgently needed and vital to the future success of our Country's foreign intelligence collection efforts.

Your August 22 letter inviting me to appear today expresses support for our need to protect our personnel. I sincerely appreciate that. Your letter also—understandably—raises the question whether the constitutional issues posed by the proposed legislative solutions—S. 2216 and H.R. 5615—have been fully considered.

I'd like to address both issues.

No one appears to be raising any question as to the need, advisability and constitutional justification for the provisions in these two bills that impose penalties on those persons, such as Agency employees and former employees, who have had authorized access to classified information for unauthorized disclosures of information revealing the identities of undercover officers and agents. The controversial aspect is the other portion of the two bills, under which, in extremely limited and carefully defined circumstances, criminal liability can attach to a person who has made such disclosures without the need for the Government to prove that the disclosure was derived from classified information. I will direct my testimony today to this latter provision.

First, on the need for this legislation: This subject has been addressed repeatedly in hearings held by the intelligence committees of both Houses. The strong support shown by the Members of those committees for identities legislation that goes beyond disclosure made by employees and former employees attests fully to the fact that the need has been understood by those in the best position to assess it. Let me, nonetheless, briefly describe the situation that these bills are intended to confront.

There exists today a small and apparently interrelated coterie of Americans who have openly devoted themselves to the destruction of certain of the Nation's authorized institutions of government, namely, the foreign intelligence agencies. This group includes a small number of renegade former CIA employees, such as Philip Agee, and a larger group of Americans who have capitalized on disclosures of classified information made in the past by such renegade former employees.

This group has engaged in a course of action openly and avowedly undertaken in order to destroy the Nation's intelligence-gathering capability through the medium of exposing as many undercover intelligence officers and assets as possible. The perpetrators of these disclosures understand correctly that secrecy is the life blood of an intelligence organization and that disclosures of undercover identities can disrupt, discredit and—they hope—even ultimately destroy an agency such as the CIA. The two principal organs of such exposure have been a series of books written and edited by these individuals and a publication, Covert Action Information Bulletin, published here in Washington, D.C. These have disclosed cumulatively approximately 1,500–1,600 names, many correct and many incorrect.

In addition, persons such as Agee and Louis Wolf, one of the editors of Covert Action Information Bulletin, have traveled to various foreign countries to carry on a campaign dedicated to stirring up local antagonism to U.S. officials through what appears to me to be only thinly veiled incitements to violence. The tragic results of this activity are well known. Five years ago Richard Welch was murdered in Athens, Greece. Mr. Welch was first alleged to be CIA Chief of Station, Lima, Peru, in the 1974–75 winter edition of Counterspy. On 25 November 1975 the Athens Daily News printed a letter to the editor in which a number of U.S. Government employees—including Mr. Welch—were alleged to be CIA officers. Included in that article were Mr. Welch's Athens home address and telephone number. Less than a month after the article appeared in the Athens Daily News, Mr. Welch was brutally gunned down in front of his home. A few weeks ago only luck intervened to prevent the death of the young daughter of a U.S. citizen employed by the U.S. Embassy in Jamaica whose house was shot up only days after Mr. Wolf appeared in Jamaica and at a highly publicized news conference gave the names, addresses, telephone numbers, and license plate numbers and descriptions of the cars of U.S. Government employees whom he alleged to be CIA officers.

I think it unnecessary to go into detail about the adverse effects this behavior is having on the work of the Nation's intelligence agencies. Simply put, our officers willingly have accepted the risks necessarily inherent in their taxing and dangerous occupation. They have not accepted the risk of being stabbed in the back by their fellow countrymen and of being left unprotected by their Nation's Government. The failure of the Congress to act so far has had a demoralizing effect. Refusal to enact effective legislation in the face of most recent developments would be incomprehensible to them. I stress the word "effective." Everyone who has any familiarity with this problem knows full well that a criminal statute limited only to disclosures made by employees and former employees would not provide the kind of relief we need. Enactment of such a statute would be little more than a misrepresentation to the public and a cruel disappointment to our personnel.

A second impact that should be obvious is on our relations with cooperating foreign governments and sources of intelligence. The bottom line is that the failure of the U.S. to take any effective action with respect to these hostile activities of our own citizens discredits us in the eyes of the world and seriously impairs our ability to convince indispensable sources of intelligence and assistance that we can protect them.

Let me turn now to the issues that have been raised regarding the policy advisability and constitutional status of the controversial portions of these bills. I would like to make an introductory comment in this regard. I have seen numberless discussions of the constitutional rights of Messrs. Agee and Wolf and company, but almost nothing as to the constitutional implications of what they are trying to do. Their purpose is no less than, by direct action, to destroy institutions of Government that our constitutional authorities, the President and the Congress, have authorized to exist and operate. They are taking the law into their own hands. Nothing could be more subversive of our constitutional system of government than to permit a disgruntled minority of citizens freely to thwart the will of the majority. I recognize the great importance of the First Amendment, but I have never understood that the First Amendment is the entire Constitution of the United States and I suggest to this Committee—as I understand the Supreme Court's interpretation of the First Amendment actually to be—that First Amendment considerations must be balanced against other compelling constitutional requirements, including the inherent constitutional right of the people of this country to have an effective defense against external aggression, a defense that necessitates a working intelligence system.

Now I would like to address a key factual element in this situation that seem to be widely misunderstood. There is no unclassified document that identifies undercover employees or agents of the CIA. Neither the House nor the Senate version of this legislation would purport to criminalize the mere disclosure of an identity that had been acknowledged by the U.S. Government in any such document. It is claimed by some opponents of these bills that the activity on which they would impact consists merely of picking information out of certain unclassified publications in which the U.S. Government through carelessness has allowed the names of CIA officers to be revealed as such. This is simply nonsense.

You should be aware of two important facts in this regard:

(1) It is certainly true that certain State Department publications, such as the Biographic Register (which used to be publicly available, but no longer is), contained information that in some cases gave clues to the identity of undercover CIA officers, not to the general public but only to those persons who by virtue of access to classified information knew how CIA cover arrangements worked. Several of these people--faithless Government employees—violated applicable law, regulation and secrecy agreements and disclosed publicly enough information about CIA cover arrangements to enable others to make some use of the Biographic Register and similar documents. These deliberate breaches of secrecy can in no way be equated to carelessness on the part of the U.S. Government. In any event, even the Biographic Register does not provide a direct and accurate indicator to CIA cover arrangements; it simply provides clues which in some cases are accurate and in others are misleading.

2. An even more key point is that the authors of the Dirty Work books and the Covert Action Information bulletin do not themselves purport to rely solely on such documents. I am attaching to my testimony and have distributed for your use copies of a portion of the "Who's Who" section of the most recent of these books Dirty Work II: CIA in Africa. The entire section is 193 pages long and lists hundreds of names of alleged CIA officers. The authors indicate their sources for each entry. I ask you to examine a representative sample of these. You will find again and again references to numerous documentary sources and to such things as "Department of State sources," "Casablanca Consulate General sources," "Rome Embassy sources," and the like. In short, if we take these people at their own word, they are engaged in an elaborate and sophisticated operation involving the collating of information from multiple documentary sources and the penetration of U.S. official establishments. There is no reason why, in addition to cultivating sources in the State Department, embassies and consulates, they cannot engage in physical surveillance, electronic surveillance abroad or any other form of investigative technique. Unlike the intelligence agencies, they have no legal constraints on the use of physical surveillance and no constraints on any investigation they may conduct of U.S. persons abroad. Basically what is described in Dirty Work II is very different from the kind of counterintelligence operations that one might expect a hostile intelligence service to mount against us.

I will defer to the Justice Department representative and the other witnesses to discuss with you the constitutional implications of these facts. It is my understanding, however, that from a constitutional point of view it is of considerable significance that the activities that these bills attempt to deal with are a systematic, purposeful job of uncovering identities and are conducted with a clear understanding, evidenced by an express intent, that their effect will be to impair or impede legitimate U.S. intelligence activities.

Some critics of this legislation have suggested that it would open up to prosecution any person who came across a classified intelligence identity, including a journalist who exposed such an identity in the course of a legitimate story on CIA activities or alleged CIA wrongdoings. This simply is not the case, as any careful reading of either the Senate or the House version would demonstrate. The version before you in the Senate requires that the actor be engaged in a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede intelligence activities of the United States. In short, the bill describes a very narrow category of persons engaged in a crusade whose commonly recognizable effect is to destroy intelligence activities in general and who further that purpose by doing much more than merely restating that which is in the public domain. They are persons who in effect engage in espionage against their Nation's intelligence agencies and, whether wittingly or not, serve the purposes of our Nation's enemies. I cannot believe that it is any more unconstitutional to deal with this kind of hostile action against the U.S. than to criminalize obscenity or to make it a crime

to shout "fire" in a crowded theater. The Justice Department, which is charged with protecting and upholding the Constitution, has studied this matter carefully and has concluded that this bill is constitutionally sound. Noted scholars, including Yale Law Professor and former U.S. Solicitor General Robert Bork, have reached the same conclusion.

A second canard about this legislation that I would like to lay to rest is that it is unnecessary because anything that a private citizen can uncover can also be uncovered by the KGB. Even if true, this observation is irrelevant. I question its accuracy because, as Americans, the publishers of Covert Action Information Bulletin probably have easier access to misguided or duped sources of information within Government agencies than would the KGB. But even if accurate, the observation fails to take account of the fact that the purpose of our cover in many places is not to fool the KGB but to protect our operations against a variety of things. One is detection by local authorities. A second, in places where our operations may be known to limited segments of the local government, is to protect against political outcry which would occur if they were publicly acknowledged or revealed. A third and increasingly important consideration is to protect against terrorist attack such as that which caused the death of Richard Welch and almost the death of Richard Kinsman and other U.S. Government employees in Jamaica.

Another widely misunderstood point is that there is no way to make all cover arrangements of guaranteed impenetrability without giving up all operations at the same time. Any cover arrangement must enable the undercover officer to have access to appropriate targets. In addition, in the process of attempting to obtain intelligence and recruit agents, an undercover officer necessarily at some time exposes his true identity to a certain number of target individuals. He hopes that his assessment of these targets has been correct and that there is no security risk as a result, but it is impossible to be certain. In short, we cannot guarantee perfect cover and at the same time assure our Executive Branch and congressional masters that we will do an effective job of collecting intelligence. What we can do is to achieve the best cover arrangements that are compatible with getting the job done, and we have made considerable strides in improving cover arrangements and in attempting to repair the vulnerabilities created by reprehensible disclosures of classified information by Government employees. What the Congress can do is to protect us from the malicious and deliberate acts of Americans who are bent on our destruction, acts that exacerbate the inherent difficulties present in our operating conditions overseas.

Mr. Chairman, I will not take any more of your time with my prepared remarks, but I will be glad to answer any questions. I have the Agency's General Counsel, Daniel Silver, with me to answer any questions the Committee may have on the legal technicalities of these bills.

Attachment.

ADAMS, DICK COMSTOCK

13 May 1929	Korea (of American parents)	
1947-48	Whitworth College	
1948-51	University of California	
1951-55	U.S. Army overseas	
1954	University of Virginia	
1955	George Washington University	
1955-56	U.S. Army unspecified research	
1956-58	private experience Christian Children's Fund treasurer, office manager	
1958-61	Department of the Army research analyst	
***6/61	International Cooperation Administration Saigon, Vietnam (E) assistant program economist	R-7
6/64	Seoul, Korea (E) Attache & political officer	R-6
8/64	Second Secretary & political officer	
4/67		R-5
as of 1/70-5/72	no entry in Department of State records	
5/72	Department of State Jakarta, Indonesia (E) political officer	R-4
as of 11/75	Dept. (EA)	
as of 6/76	Cotonou, Benin (E) cover position not known (CIA Chief of Station)	
Sources:	BR 1974, 1969, 1964 FSL 8/75, 6/72, 9/69, 7/64 Cotonou Diplomatic List 1976 Department of State Sources	

***This appointment began with the International Cooperation Administration, the predecessor until 11/61 to the Agency for International Development.

AITKEN, ROBERT D.

14 Sep 1928	New Jersey	
1946-47	U.S. Army overseas	

1951	LaSalle College BA	
1951-52	Georgetown University	
1952-57	Department of the Army claims investigation officer	
8/57	Department of State Bangkok, Thailand (E) public safety advisor	R-5
11/59-5/61	Department of the Army operations officer	
5/61	Department of State Benghazi, Libya (Office) Attache & political officer	R-5
9/61	Second Secretary & political officer	
11/63	Dept.	
5/65		R-4
7/66	Dakar, Senegal (E) political officer (CIA Chief of Station)	
10/68	Dept. (AF)	R-3
as of 6/72-7/74	no entry in Department of State records	
8/74	Department of State Dar-es-Salaam, Tanzania (E) First Secretary & economic-commercial officer (CIA Chief of Station)	
as of 12/76	Dept. (AF)	
Wife:	Carol	
Sources:	BR 1971, 1967 FSL 8/75, 11/74, 2/72, 5/69, 5/67, 1/64, 7/61 Dar-es-Salaam Diplomatic & Consular Lists 1/76, 1/75 Dar-es-Salaam Embassy Source Department of State Sources	

ALBERT, FRANCIS L. Jr.

31 Jan 1925	California	
1943-45	U.S. Army overseas	
1947	Harvard University BA	
1947-48	private experience research organization consultant	

Who's Who		303
1947-48	boys school instructor	
1947-48	Berlitz School of Languages	
1950	University of North Carolina MA	
1949-51	private experience university instructor	
1952-55	Department of Defense political analyst	
4/55	Department of State Paris, France (E) Attache & political officer	R-4
7/56		R-5
9/59	Dept.	
4/62		R-4
9/62	Algiers, Algeria (E) Attache & political officer (CIA Deputy Chief of Station)	
5/63	Second Secretary & political officer	
4/65		S-2
5/65	Dept.	
4/67	plans and programs officer	GS-14
5/68	Dar-es-Salaam, Tanzania (E) First Secretary & economic-commercial officer (CIA Chief of Station)	R-3
9/71	Dept. (AF)	
as of 2/73	no entry in Department of State records	
Wife:	Mary Swingle	
Sources:	BR 1972, 1968 FSL 10/72, 10/71, 9/68, 6/65, 10/62, 1/60, 10/55 Dar-es-Salaam Diplomatic & Consular Lists 1/71, 1/70	

ALLOCCA, RICHARD

19 Dec 1944

4/71	Department of State Kinshasa, Zaire (E) Third Secretary & political officer	R-7
5/73		R-6

7/74	New Delhi, India (E) Second Secretary & political officer	
2/76		R-5
as of 10/77	Mogadiscio, Somalia (E) cover position not known	
as of 4/79	consular officer	
Wife:	Marie Bahizi	
Sources:	BR 1974 FSL 8/75, 11/74, 6/71 Mogadiscio Embassy Source New Delhi Embassy Source Kinshasa Diplomatic List 9/73 Department of State Sources	

ANDERSON, CARL R.

24 Oct 1924	Massachusetts	
1942-45	U.S. Army	
1950	University of Georgia BA	
1952	University of Georgia MA	
1952-58	Department of the Army area analyst	
1952-53	Vanderbilt University	
1/58	Department of State Calcutta, India (CG) political officer	R-7
7/58	Vice-Consul & political officer	
6/60	Dept.	
1/61-9/62	private experience unspecified research organization associate	
10/62	Department of State Khartoum, Sudan (E) Attache & political officer	R-6
1/65	Dept.	
as of 10/65-4/72	no entry in Department of State records	
5/72	Department of State Asmara, Ethiopia (CG) political officer	R-5

7/73	Addis Ababa, Ethoipia (E) Second Secretary & political officer	
as of 10/74	Dept. (ARA-LA)	
Sources:	BR 1974, 1964 FSL 6/74, 10/73, 10/72, 6/72, 6/65, 1/63, 1/61, 7/60, 4/58 Addis Ababa Diplomatic List 1/74	

ANDERSON, FRANK RAY

1 Feb 1942	Illinois	
1959-62	U.S. Army overseas	
1963-64	private experience finance company management trainee	
1964-65	assistant training director	
1965-66	marine supplies company sales manager	
1968	University of Illinois BA	
1968-69	Department of Defense research	
6/69	Department of State Beirut, Lebanon (E) (FSI Field Language School) detailed for Arabic language training	S-6
8/71	Tripoli, Libya (E) consular officer	
5/73	Second Secretary, Vice-Consul & economic-commercial officer	S-5
5/74	Dept. (AF)	
3/75	Sana'a, Yemen Arab Republic (E) Second Secretary & consular officer	R-6
2/76		R-5
5/77	Beirut, Lebanon (E) Second Secretary & Consul	
Language:	Arabic	
Wife:	Barbara	
Sources:	BR 1974 FSL 8/75, 10/71, 1/70 Beirut Diplomatic List 4/78 Sana'a Diplomatic List 2/76 Tripoli Diplomatic List 2/73 Department of States Sources	

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ANDERTON, JOHN G.

6 Sep 1917	California	
1938	Princeton University BA	
1938-1939	University of Grenoble	
1939-40	private experience steamship company clerk	
1940-41	newspaper reporter	
1941-46	U.S. Army overseas Major	
2/47	Department of State Dept.	S-8
4/47	Peking, China (C) Vice-Consul	
7/50	Dept.	
1950-57	Department of the Army foreign affairs officer	
7/57	Department of State Rabat, Morocco (E) Attache & political officer (CIA Chief of Station)	R-3
8/57	First Secretary & political officer (CIA Chief of Station)	
11/60	Dept.	
8/62	Algiers, Algeria (E) political officer (CIA Chief of Station)	
9/62	Attache & political officer (CIA Chief of Station)	
12/65	Dept. (AF)	
3/67	international economist	GS-17
as of 9/67-7/71	no entry in Department of State records	
8/71- at least 1/73	Department of State Pretoria, South Africa (E) Attache (CIA Chief of Station)	

Sources: BR 1967
FSL 5/67, 1/67, 10/62, 1/61, 10/57, 10/50, 7/47
Pretoria Diplomatic Lists 1/73, 1/72

ASSURAS, DEMETRIOS C.

b. not known

5/77	Department of State Dept.	R-6
as of 7/77	Casablanca, Morocco (CG) Consular Section	
as of 7/78	Dept.	
Sources:	Casablanca Consulate-General Source Department of State Sources	

ATKINS, EDWIN FRANKLIN

15 Oct 1929	New York	
1951	Harvard University BA	
1951-54	Department of Defense political analyst	
1/55	Department of State Cairo, Egypt (E) political officer	R-6
7/56		R-7
2/59		R-6
10/59	Dept.	
12/60	(Foreign Service Institute) Arabic language training	
6/61	Baghdad, Iraq (L) economic officer	
8/61	Second Secretary & economic officer	
4/62		R-5
12/63	Dept.	
1/65		S-3
1/66		S-2
6/68	Khartoum, Sudan (E) political officer	
rating not known	(CIA Chief of Station	R-4
10/69	Dept. (EUR)	
10/70	Milan, Italy (CG) consular officer (CIA Chief of Base)	

7/73	Rome, Italy (E) consular officer	
2/76		R-3
6/78		RU-3
as of 9/78	Paris, France (E) First Secretary (CIA Co-Deputy Chief of Station)	
Wife:	Elaine Perry	
Sources:	BR 1974, 1970, 1967 FSL 8/75, 4/75, 6/74, 2/71, 9/68, 4/64, 10/61, 4/59, 10/56, 4/55 Paris Diplomatic List 4/79 Rome Diplomatic List 8/73 (updated) Rome Consular Lists 3/75, 3/74 Rome Embassy Source Department of State Sources	

ATWATER, JAMES L.

5 Feb 1932	North Carolina	
1953	North Carolina College BA	
1953-55	U.S. Army	
1957	University of Pennsylvania MA	
1957-59	U.S. Army overseas	
1960	no entry in Department of State records	
1961-63	private experience teacher	
1964-65	university professor	
1965-67	Department of Commerce	
10/67	Department of State Dakar, Senegal (E) Second Secretary & political officer	R-5
***8/70	Cotonou, Dahomey (E) Second Secretary & political officer (CIA Chief of Station)	
5/72		R-4
9/73	Dept.	
7/77		RU-4
as of 9/77	N'djamena, Chad (E) cover position not known (CIA Chief of Station)	

Language:	French
Wife:	Colette Huc
Sources:	BR 1974 FSL 8/75, 10/73, 10/70, 1/68 Cotonou Diplomatic List 1972 Dakar Diplomatic List 1971 Department of State Sources

***Dahomey achieved its independence in November 1975 and became Benin.

***BACON, GEORGE J.

b. not known

6/76	Department of State Dept.	R-6
as of 10/76	Kinshasa, Zaire (E) telecoms	
as of 12/78	Dept. (A/OC)	
Sources:	Kinshasa Embassy Sources Department of State Sources	

***Soon after receiving a medal at CIA Headquarters in reward for his work in Laos, George Bacon III, an experienced CIA paramilitary officer well-known at Langley, travelled to London to recruit mercenaries for Angola. Never having laid down his guns, he also went to join the CIA's war, and in February 1976, died at the hands of the MPLA. It is thought he and George J. Bacon were related.

BANE, HOWARD T.

5 August 1927	Virginia	
1944-46	U.S. Navy overseas	
1949-50	Department of State Dept. clerk	
1950-51	drafting officer	
1951	Georgetown University BA	
1951-55	Department of the Army research analyst	
6/55	Department of State Bangkok Thailand (E) Assistant Attache & political officer	R-5
7/56		R-6
1/57	Second Secretary & Vice-Consul	
7/58	Dept.	

9/59	New Delhi, India (E) Second Secretary & political officer	
3/60		R-5
6/62	Dept.	
7/64	Accra, Ghana (E) political officer (CIA Chief of Station)	R-4
8/67	Dept. (AF)	
5/68		R-3
8/69	Nairobi, Kenya (E) First Secretary (Political) political officer (CIA Chief of Station)	
as of 6/74	The Hague, Netherlands (E) Attache (CIA Chief of Station)	
as of 3/76-3/78	no entry in Department of State records	
as of 4/78	Central Intelligence Agency Chief, Office on Terrorism	
Sources:	BR 1973, 1957 FSL 6/74, 1/70, 9/69, 10/64, 1/63, 10/59, 10/58, 7/55 The Hague Diplomatic Lists 2/76, 7/75, 6/74 Nairobi Diplomatic Lists 3/73, 2/72 Central Intelligence Agency Source	

*****BEAM, JOHN C.**

as of 1/79:
21, rue General Laperrine, El-Biar
Algiers, Algeria
78-24-51

25 Mar 1935	Montana	
1956	Montana State University BA	
1956-59	U.S. Army overseas	
1960-65	private experience foreign trade consultant	
1965-67	Department of Commerce investment specialist	
5/67	Department of State Rabat, Morocco (E) consular officer	R-6
1/70	Dept. (AF)	
4/70		R-5

7/71	Bujumbura, Burundi (E) political officer (CIA Chief of Station)	
4/72	political-economic officer (CIA Chief of Station)	
4/74		R-4
7/74	Rabat, Morocco (E) First Secretary & economic-commercial officer (CIA Deputy Chief of Station)	
as of 8/76	Algiers, Algeria (E) cover position not known (CIA Chief of Station)	
5/77		RU-4
as of 8/78	First Secretary (Economic-Commercial Affairs) (CIA Chief of Station)	

Wife: Josephine Brosnahan

Sources: BR 1974
FSL 8/75, 11/74, 10/71, 5/70, 9/67
Algiers Diplomatic Lists 1979, 1978
Rabat Diplomatic List 1974
Department of State Sources

***Though Beam's middle name is not known at this time, knowledgeable sources in Algiers report that recently, a First Secretary at the U.S. Embassy has on occasion been using the name "John Cooke." It may or may not be the same person.

BECK, WILLIAM GRANVILLE

b. not known

as of 11/77	Department of State Nouakchott, Mauritania (E) Second Secretary & Consul (CIA Chief of Station)	rating not known
as of 4/79	Second Secretary, Consul & political officer (CIA Chief of Station)	

Sources: Nouakchott Diplomatic List 1979
Nouakchott Embassy Source
Department of State Sources

BERENS, CHARLES EUGENE

1 Sep 1925	Washington, D.C.
1943-46	U.S. Merchant Marine
1951	University of North Carolina BS

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1952	private experience manufacturing company labor relations trainee	
1952-54	U.S. Army	
1955	private experience advertising company contact man	
1955	Department of the Army administrative assistant	
1955	George Washington University	
10/55	Department of State Dept. clerk	S-12
11/55	Rangoon, Burma (E) cover position not ascertainable	
7/57		S-11
6/58-7/60	Department of the Army plans officer	
7/60	Department of State Dept. detailed to Foreign Service Institute	R-7
4/61	Surabaya, Indonesia (C) political officer	
5/61	Vice-Consul & political officer	
3/63		R-6
12/63	Dept.	
7/65	Dar-es-Salaam, Tanzania (E) Attache, Vice-Consul & consular officer	
10/65	Second Secretary, Vice-Consul & consular officer	
5/66		R-5
5/68		R-4
8/69	Lagos, Nigeria (E) Second Secretary, Consul & political officer	
as of 10/72	Dept. (AF)	
as of 2/73-12/74	no entry in Department of State records	
1/75	Department of State Khartoum, Sudan (E) political officer (CIA Chief of Station)	R-3

as of 1/78	First Secretary (CIA Chief of Station)	
as of 12/78	Dept.	
Wife:	Sheila McNeice	
Sources:	BR 1972, 1968 FSL 8/75, 4/75, 10/72, 9/69, 10/65, 4/64, 7/61 Khartoum Diplomatic List 1/78 Lagos Diplomatic & Consular Lists 5/72, 1/71	

BEHRENS, JOHN FREDERICK

as of 1/79:
Plot 2218, 14 Nsumbu Road
Lusaka, Zambia
50857

8 Oct 1931	Iowa	
1951-53	U.S. Army	
1954-57	Department of the Army radio technician	
9/57	Department of State Manila, Philippines (E) communications assistant	S-11
***3/60	Damascus, United Arab Republic (CG) communications assistant	S-10
12/62-5/66	Department of the Army communications technician	
6/66	Department of State New Delhi, India (E) telecoms supervisor	S-6
as of 5/68	telecoms officer	
9/68-10/71	Department of the Army communications technician	
11/71	Department of State Lagos, Nigeria (E) telecoms officer	S-6
as of 11/74	Dept. (AF)	
as of 4/75-6/78	no entry in Department of State records	
as of 7/78	Department of State Lusaka, Zambia (E) telecoms support officer (telecoms chief)	R-6
Wife:	Jerrine Jordan	

Sources: BR 1974
FSL 11/74, 2/72, 5/70, 9/68, 1/67
Lusaka Diplomatic List 1/79
Lusaka Embassy Source
Department of State Sources

***The United Arab Republic became the Syrian Arab Republic in October 1961, and the Consulate General was upgraded to Embassy Status.

BENEDETTI, ROBERT A.

24 Dec 1942	Massachusetts	
1964	Middlebury College BA	
1965	Duke University MA	
1965-67	private experience instructor	
1967-71	teacher-tutor	
9/71	Department of State Dept. projects officer	GS-12
1/74	Kinshasa, Zaire (E) Second Secretary & political officer	R-6
as of 10/77	Lusaka, Zambia (E) cover position not known	
9/78	Gaborone, Botswana (E) consular officer (CIA Chief of Station)	R-5

Wife: Sallie Gorczakoski

Sources: BR 1974
FSL 8/75, 2/74
Kinshasa Diplomatic List 10/74
Kinshasa Embassy Sources
Department of State Sources

***BENZ, SHELDON W.**

3 Jan 1927	Pennsylvania
1945-46	U.S. Air Force overseas
1947-49	private experience salesman
1950	not ascertainable
1951	private experience manufacturing firms assembler

1951-68	unspecified government agency communications officer	
9/68	Department of State Manila, Philippines (E) telecoms specialist	S-5
as of 5/70	telcoms officer	S-4
as of 10/71	Dept. (EA)	
as of 2/72-5/74	no entry in Department of State records	
6/74	Department of State Addis Ababa, Ethiopia (E) telecoms officer (telecoms chief)	R-6
as of 11/77	Dept. (A/OC)	
Wife:	Margaret	
Sources:	BR 1974 FSL 8/75, 6/74, 10/71, 1/69 Addis Ababa Embassy Source Department of State Sources	

***Growing out of his CIA training and experience, Benz is an amateur radio operator licensed by the Federal Communications Commission.

BERGER, MICHAEL JAY

5 Oct 1934	New York	
1956	Cornell University BA	
1956-57	Columbia University Graduate School of Business Administration	
1957-58	U.S. Army overseas	
1958-59	private experience manufacturing firm sales management assistant	
1959-60	American University	
1959-60	private experience research office research associate	
1960-62	Department of the Army research analyst	
3/62	Department of State Montevideo, Uruguay (E) Assistant Attache	R-8
6/64	Santo Domingo, Dominican Republic (E) Assistant Attache & political officer	

9/64	Attache & political officer	
1966-69	Department of Defense administrative officer	
11/69	Department of State Dept. foreign affairs officer	GS-13
1970-74	no entry in Department of State records	
as of 11/74	Department of State Paris, France (E) Regional Reports Office	
8/75	Yaoundé, Cameroon (E) political-economic officer (CIA Chief of Station)	R-4
as of 5/76	First Secretary (CIA Chief of Station)	
as of 1/78	Dept. (AF)	
Wife:	Ema Garcia	
Sources:	BR 1970, 1966 FSL 8/75, 10/65, 7/64, 7/62 Yaoundé Diplomatic Lists 10/76, 5/76 Paris Embassy Source Department of State Sources	

BERGIN, MARTIN J. Jr.

25 Mar 1919	New York	
1941	St. Peter's College BA	
1941-46	U.S. Army overseas Captain	
1947-48	private experience law office historical researcher	
1948	Columbia University MIA	
1948-51	Economic Cooperation Administration Paris, France research analyst	
1951-54	Library of Congress research analyst	
6/54	Department of State Teheran, Iran (E) Assistant Attache	S-7
7/57		S-6
as of 1/58	Assistant Attache & political officer	

7/59	Dept.	
10/59		R-5
3/63		R-4
***6/63	Usumbura, Burundi (E) Assistant Attache & political officer (CIA Chief of Station)	
10/63	Second Secretary, Consul & political officer (CIA Chief of Station)	
10/65	Dept. (AF)	
4/67	plans & programs officer	GS-14
7/71	Dakar, Senegal (E) First Secretary & international relations officer (CIA Chief of Station)	R-3
9/73	Abidjan, Ivory Coast (E) political officer (CIA Chief of Station)	
as of 12/75	Dept. (AF)	
Wife:	Nicole Jachiet	
Sources:	BR 1974, 1961-62 FSL 8/75, 10/73, 10/71, 10/63, 10/59 1/58, 10/54 Dakar Diplomatic List 1/72 Department of State Source	

***Usumbura became Bujumbura in 1964.

BETTS, LUCELOUS, Jr.

b. not known

as of 6/73	Department of State Kampala, Uganda (E) communications-records assistant	S-9
***as of 1/74-6/77 no entry in	Department of State records	
as of 2/77	Department of State Kinshasa, Zaire (E) telecoms	
as of 5/79	Dept. (A/OC)	
Sources:	FSL 2/74, 6/73 Kinshasa Embassy Source Department of State Sources	

***Before this date, Betts was a bona fide State Department employee, but then joined the CIA.

BLEAM, DENNIS L.

21 Mar 1939	Pennsylvania	
1955-61	private experience manufacturing company shipping clerk, packer	
1961	Moravian College BS	
1962-64	private experience manufacturing company accountant	
1962-63	U.S. Army	
1965-69	Department of the Army clerk	
3/69	Department of State Nairobi, Kenya (E) political section clerk	S-5
6/71	Kinshasa, Zaire (E) political section clerk	
as of 6/72		S-4
as of 9/74	Dept. (AF)	
as of 10/75	Geneva, Switzerland (M) Attache & SPA	
Wife:	Shahnaz Meshkin	
Sources:	BR 1974 FSL 6/74, 9/69 Geneva Diplomatic Lists 1/76, 10/75 Geneva Mission Source Department of State Source	

BORGEL, JACQUELINE J.

b. not known		
as of 12/76	Department of State Nairobi, Kenya (E) secretary	rating not known
as of 7/78	Pretoria, South Africa (E) secretary (Political Office) (secretary to CIA Chief of Station)	
Sources:	Nairobi Embassy Source Pretoria Embassy Source Department of State Source	

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BRANT, ERNEST B.

4 Dec 1942	Illinois	
1962-68	private experience aircraft manufacturing firm chemist	
1967	California State College BS	
1968-71	U.S. Army	
1972-74	Department of the Army research analyst	
2/74	Department of State Nairobi, Kenya (E) Third Secretary (Political) & political officer	R-7
4/75	Pretoria, South Africa (E) Third Secretary & economic-commercial officer	
as of 8/76	Dept.	
2/78		R-6
as of 7/78	Lagos, Nigeria (E) cover position not known	
Wife:	Christina Larsen	
Sources:	BR 1974 FSL 8/75, 4/75, 6/74 Nairobi Diplomatic Directory 3/75 Preteoria Department of Foreign Affairs List 12/75 Pretoria Diplomatic List 7/75 Pretoria Embassy Source	

BRAYTON, DONALD E.

17 Sep 1932	Rhode Island	
1950-54	U.S. Air Force overseas	
1955-56	not ascertainable	
1957-62	unspecified government agency electronics specialist	
1/63	Department of State Accra, Ghana (E) communications assistant	S-6
8/65	Dept.	
as of 5/69		S-5
as of 10/70	(NEA)	

as of 2/74-4/73	no entry in Department of State records	
5/73	Department of State Monrovia, Liberia (E) telecoms technician	R-6
as of 10/76	Dept. (A/OC)	
as of 8/78	Athens, Greece (E) probably telecoms	
Wife:	Herlene Jacques	
Sources:	BR 1974 FSL 8/75, 6/73, 10/70, 1/67, 4/63 Department of State Sources	

BRETT, BRUCE W.

not known		
as of 11/74	Department of State Kinshasa, Zaire (E) Political Section & special assistant (Administration Section)	rating not known
as of 6/76	no entry in Department of State records	
Sources:	Kinshasa Embassy Sources Department of State Sources	

BRUHA, JAMES ANTHONY

4 Dec 1933	Illinois	
1955	St. Joseph's College BA	
1955-57	U.S. Marine Corps overseas	
1957-61	private experience De Paul Academy English teacher & department chairman	
1961	De Paul University MA	
1961-67	private experience high school teacher	
1967-72	unspecified government experience	
3/72	Department of State Tunis, Tunisia (E) Second Secretary (Consular Affairs) & consular officer	R-6
as of 12/75	Kinshasa, Zaire (E) Second Secretary, Vice-Consul & Consular Section	

as of 1/79	Dept. (AF)	
Wife:	Margaret Van Leuwen	
Sources:	BR 1974, 1972 FSL 8/75, 6/72 Kinshasa Diplomatic List 9/77 Kinshasa Embassy Sources Tunis Diplomatic Lists 2/75, 7/72 Department of State Sources	

BRUNER, WHITLEY

24 Aug 1942

8/71	Department of State Dept. (Foreign Service Institute) detailed for language training	R-7
2/72	Beirut, Lebanon (E) (FSI Field Language School) detailed for language training	
6/73	San'a, Yemen Arab Republic (E) economic commercial officer	
3/75		R-6
6/75	Cairo, Egypt (E) Second Secretary (Political Affairs) & political-economic officer	
9/78		R-5
as of 4/79	Baghdad, Iraq (E) cover position not known	
Language:	Arabic	
Sources:	BR 1974 FSL 8/75, 10/73, 6/72, 10/71 Cairo Diplomatic Lists 4/78, as of 3/77 Cairo Embassy Source Department of State Sources	

BULL, RICHARD C.

6 Oct 1932	Missouri
1954	Princeton University BA
1954-57	U.S. Army overseas
1957-58	Georgetown University
1958-61	Department of the Army research and reports analyst

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PREPARED STATEMENT OF ROBERT L. KEUCH

I am pleased to appear today to comment on the bill recently reported by the Senate Intelligence Committee and referred to this Committee in an area of critical importance— protecting the confidential identities of intelligence agents and sources who serve this country overseas. My remarks will be brief, because I have testified extensively about this legislation during its development.

As I have previously testified, the Department of Justice strongly supports the passage of legislation providing new criminal penalties for unauthorized identification of the covert intelligence agents and sources who serve this country overseas. A strong foreign intelligence capability is essential to the national security of the United States. The quality of our intelligence gathering will be measurably diminished unless we can prevent unauthorized disclosure of the covert intelligence roles of our agents and sources. Such disclosures not only impair our foreign intelligence and counterintelligence activities, but can expose individual agents and sources to physical danger. Accordingly, the Department of Justice supports the passage of legislation to prevent unauthorized disclosures and to provide appropriate punishment when such disclosures do occur.

It is our opinion that the knowing disclosure of the identity of a covert intelligence agent or source of the Central Intelligence Agency or a foreign intelligence component of the Department of Defense constitutes a violation of the current espionage statutes found in Title 18, sections 793(d) and (e). However, the passage of an act dealing specifically with the disclosure of covert identities will be an aid to effective law enforcement because the government will be able to avoid several substantial hurdles which exist in prosecutions brought under the present espionage statutes.

Identities protection, of course, is an area where we must steer carefully between two monumental interests—on the one hand, the protection of freedom of speech, the Constitutional right of citizens to discuss and debate issues concerning politics and government, including issues of American foreign policy; and on the other hand, the need to protect the effectiveness of American intelligence gathering abroad. We believe the legislation reported out by the Senate Intelligence Committee satisfies both needs. When I testified before the Senate Intelligence Committee on its earlier draft bill—that is, S. 2216 before it was amended—I expressed the Department's concern about the potential breadth of the bill's coverage. We were concerned, first, that the bill would have punished individuals who did not knowingly identify covert agents and sources, but who only revealed indirect information that they had "reason to know" would have an identifying effect. The Committee has tightened the bill in that respect, now requiring that any identification be knowing, and we agree with the wisdom of the change.

A second concern of the Department had been the breadth of coverage provided for disclosures based on public record information. As originally put, the bill not only criminalized use of classified information to identify agents, and disclosures by former government employees, but it also criminalized any use by any individual of information from the public record to reveal even a single covert identity, so long as the government could demonstrate the requisite intent on the part of the person to "impair or impede the foreign intelligence activities" of the United States. We are concerned that legitimate news reporting of foreign policy and foreign affairs, and even dinner-table political debate by citizens, might be chilled by the breadth of that provision, and that the intent requirement would not be enough to avoid potential chilling. The Committee has gone far to meet this concern by providing that a single act of disclosure would be covered only if it is part of an ongoing effort to destroy intelligence covers—or to use the amended bill's exact language, only if it occurs during a "pattern of activities intended to identify and expose covert agents". Thus, the disclosure of an isolated name of an agent or a source, in the course of a serious discussion of the nature of American involvement in a certain country or area or a question of intelligence policy, would not be the target of the bill's prohibition.

Another serious concern of the Department of Justice was the requirement of the original draft that an individual must have had the subjective "intent to impair or impede the foreign intelligence activities of the United States." As I have previously testified, such a scienter requirement raised very serious prosecutorial and constitutional concerns. In previous testimony I said, and I quote:

"The scienter requirement—that an individual must have acted with 'intent to impair or impede the foreign intelligence activities of the United States'—is not a fully adequate way of narrowing the provision. First, even such a scienter

standard could have the effect of chilling legitimate critique and debate on CIA policy. A mainstream journalist, who may occasionally write stories based on public information mentioning which foreign individuals are thought to have intelligence activities. Speculation concerning intelligence activity and actors critical of the CIA could be used as evidence of an intent to 'impede' foreign intelligence activities. Speculation concerning intelligence activity and actors abroad would be seemingly more hazardous if one had even taken even a general position critical of the conduct of our covert foreign intelligence activity.

"And yet, even as it may chill legitimate journalists, that same intent requirement would pose a serious obstacle in any attempted use of § 501(b) to prosecute individuals who for no reasonable purpose of public debate expose wholesale lists of our intelligence operatives. The intent element mandates that in every case where a defendant fails to admit an intent to impair or impede, a serious jury question on the issue of intent will arise. A defendant could claim that his intent was to expose to the American people questionable intelligence gathering operations which he 'believed' to be improper, rather than to disrupt intelligence operations, and the government may find it a practical impossibility to ultimately establish the requisite intent beyond a reasonable doubt, thereby rendering the statute ineffective.

"Second, and perhaps more importantly, the intent element will facilitate 'graymail' efforts by a defendant to dissuade the government from proceeding with the prosecution. Under § 501(b) of the House bill, a defendant will be able to argue for disclosure, either pretrial or at trial, of sensitive classified information relating to the alleged activities of covert agents, on the ground that the information is relevant to the issue of whether he intended the revelations of identity to 'impede' American intelligence activities or rather intended the revelations to lead to supposed reform or improvement of future intelligence activities.

"Moreover, * * * the * * * specific intent requirement tends to invite a 'good faith' defense—the claim by a defendant that while his disclosure may have hampered the success of a particular intelligence operation or project, his overall purpose was to alert the Congress and the American public to a necessary reform of intelligence policy, or to point out an intelligence operation that was unwise or illegal, and that he had no desire or intention to injure our overall intelligence capability."

The amended version of S. 2216 has responded to these concerns by providing that, in disclosing information that identifies a covert agent, an individual must do so "with reason to believe" that such disclosure will impair or impede the intelligence activities of the United States. In other words, the amended draft imposes not a subjective, but an objective standard. In doing so, we believe S. 2216 now fully meets the constitutional and other objections we raised.

As I indicated earlier in my statement, the Department of Justice believes that S. 2216 not only satisfies the objections we raised, but otherwise satisfies the applicable constitutional standards. The constitutional objections that have been raised to the proposed legislation center mainly on Section 501(c) and I would like to close my prepared statement by discussing that section specifically since my comments concerning its constitutionality apply a fortiori to the other provisions of the legislation before us.

As you know, the Department has participated in the effort to fashion new legislation in this field. In January the Department gave its support to a proposal that would make it an offense for anyone, including individuals outside Government, to publish information identifying a covert agent if the publication is knowingly based on "classified information." The proposed Section 501(c) departs from that proposal in at least two respects. First, although the Government would be required to prove in any prosecution under § 501(c) that the covert relationship disclosed by the defendant was classified and that the defendant knew that the United States was taking affirmative measures to conceal the relationship, the statute would not require the Government to prove that the disclosure was actually "based on" classified information. In other words, although it would require proof of a knowing disclosure of a secret relationship, it would not require proof that the defendant had direct or indirect access to human or documentary sources subject to the Executive order that establishes the classification system. This difference between the Department's proposal and § 501(c) broadens the potential coverage of the latter, although the two proposals would undoubtedly overlap at a number of points in their application to actual cases.

The second major difference between the two proposals lies in the requirement, imposed by § 501(c), that the Government prove that the defendant made his disclosure "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." This requirement substantially narrows the coverage of § 501(c), and reflects the judgment that general public discussion of intelligence activities is desirable and that any new prohibition in this field must be narrowly drawn to preserve that general interest against unnecessary encroachment. In accordance with that principle, § 501(c) does not seek to prohibit discussion generally, but is directed at the individual who takes it upon himself to bring intelligence activity to a halt and who does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent the intelligence functions will be disrupted by the disclosure itself.

The Supreme Court has, of course, consistently held that the Nation has interests that can justify prohibitions against some kinds of speech in some circumstances. In particular, the Court has held that the Nation has a compelling interest in erecting and maintaining effective systems of national defense, including intelligence systems; and the Court has upheld prohibitions against unbridled speech that threatens necessary defense or intelligence systems in a direct and immediate way. *See, e.g., Debs* v. *United States*, 249 U.S. 211 (1919); *Snep* v. *United States*, —— U.S. —— (1979).

The prohibition set forth in § 501(c) requires proof that the intelligence identity in question was classified and that the defendant knew that the Government was attempting to keep the identity secret. It thereby avoids a criticism that some judges have directed at other statutes in this field—statutes that do not expressly confine their strictures to cases in which there is an actual "occasion for secrecy." *See, e.g., United States* v. *Heine*, 151 F.2d 313 (2d Cir. 1945) (Hand, J.). Yet the essence of the offense described in § 501(c) is not the knowing complicity of the defendant in a breach of the classification system. The essence of the offense is the defendant's attempt to create, through private speech, a direct and immediate obstruction to a necessary defense process. In this respect the prohibition set forth in § 501(c) resembles the prohibition that was upheld by the Court in *Debs* v. *United States*, *supra*. In an opinion by Mr. Justice Holmes, the Court ruled in that case that although Eugene Debs was free to criticize the public policy that had taken the Nation into World War I, he was not free to engage in a deliberate attempt to obstruct a necessary defense process—military recruitment. Because his speech to the citizens of Dayton, Ohio, created a clear and imminent danger that recruitment would in fact be obstructed, the Court concluded that Government could constitutionally proceed against him.

Congress may conclude that an ongoing enterprise designed to identify intelligence agents and to destroy their effectiveness through disclosure can threaten a necessary defense process. Prohibitions reaching analogous conduct are already on the books. One could argue persuasively that in a particular case there may be a legitimate individual interest in engaging in an enterprise of that sort; but in assessing the constitutional balance between that interest and the compelling national interest in maintaining an effective intelligence system, we cannot conclude, given the case law, that there is no instance whatever in which the Government can make such an enterprise unlawful.

As I have noted in my testimony, S. 2216 incorporates a number of recommended changes designed to make clear the narrow scope of the prohibition and to prevent the prohibition from chilling bona fide debate over intelligence policy and practic. It is our view that the bill, as amended, strikes a proper constitutional balance among the competing interests involved.

Mr. Chairman, legislation in this area is critical to the morale and continuity of our intelligence service, to the confidence that foreign sources have in us, and to our ability to protect national security in a hostile world. The Department strongly recommends that the Judiciary Committee report out an agent identities bill with a favorable recommendation, so that we can look forward to passage in this Congress.

Thank you very much.

PREPARED STATEMENT OF EDWARD J. O'MALLEY

It is a pleasure to be here today to examine the provisions of S. 2216, which is designed to strengthen U.S. intelligence capability by protecting covert sources and employees from disclosure by employees or former employees and others who intend to damage the national security of the United States.

The last few years have seen examples of those who seek to cause injury to our intelligence efforts and at the same time, place the lives of our employees and sources in jeopardy. There is no question that this issue must be addressed before additional damage occurs.

Mr. Chairman, Director Webster in recent appearances before the Congress on the proposed intelligence charter, supported a criminal statute to protect the security of individuals who are in a covert relationship with the United States and suggested that such protection include FBI foreign counterintelligence and international terrorist sources and employees. The proposal before this committee has evolved from lengthy examination of the problem by this Congress and the administration and it is supported by the FBI.

As the committee is aware, the original proposals did not extend protection to FBI sources or employees who are acting covertly, and it may appear that the limited inclusion of the FBI is an afterthought. I want to assure this committee that the FBI is and has always been as concerned about the potential for harm to its sources within the United States and employees who covertly journey abroad as any other intelligence agency. The physical danger to these sources and employees and the damage resulting to the legitimate intelligence activities of the FBI and the overall United States intelligence effort from disclosure could be substantial.

We recognize, Mr. Chairman, that the stimulus for this legislation is generally perceived as the need to protect the identities, and therefore the safety of sources and employees whose covert roles for U.S. intelligence are disclosed, and this is without question a grave problem at this time. We must not lose sight, however, of the fact that disclosure of a previously concealed operative will be detrimental to the ability of this country to gather foreign intelligence or to protect itself through foreign counterintelligence or foreign counterterrorism activities.

The FBI is deeply concerned about the security of its personnel, sources, and operations targeted against the activities of hostile foreign powers and international terrorist groups. We are in possession of information that indicates continuing attempts to identify our sources and operations, and we believe that this proposed legislation will add a measure of security and act as a deterrent to those who, for various reasons, seek to diminish or destroy FBI capability. This proposal will offer protection to all FBI sources who assist us in foreign counterintelligence and foreign counterterrorism activities, and would protect FBI employees acting in a covert capacity who act outside the United States. The exclusion of FBI covert employees operating within the United States does not, in our view, pose a serious problem. The impact on the personal safety of FBI covert employees within the United States cannot be equated with the consequences accruing to a CIA overseas employee who is exposed. The significant harm to the FBI and, therefore, to our mission in U.S. intelligence would come, in our view, through exposure of covert FBI employees overseas, and particularly through exposure of FBI sources wherever they may be. These categories of employees and sources would, of course, be covered by this legislation.

Mr. Chairman, we are not unmindful that a constitutional concern has been expressed to this Congress by some witnesses who have appeared before other committees on this legislation. The FBI will defer to Department of Justice experts on the subject of constitutionality, but I would like to make it clear that the FBI does not view this legislation as being directed against any particular class or group of persons, nor is it an effort to silence legitimate debate, or those who criticize the role or activities of the FBI. We seek only to be able to proceed against those who, through a position of trust in the government, have learned or can discern covert identities and disclose them, or others whose aim is to destroy the effectiveness of the legitimate U.S. intelligence effort. I assure you, Mr. Chairman, that Director Webster would not support this legislation if its purpose either clearly or subtly, is to silence legitimate debate or

discussion. We seek only to protect the integrity of our lawful intelligence activities against those who intend to destroy these activities.

Mr. Chairman, the FBI supports the passage of this legislation and recommends favorable consideration by this committee.

This concludes my formal remarks, and I will be pleased at this time to respond to questions from this committee.

Senator METZENBAUM. The next panel includes Floyd Abrams, of Cahill, Gordon and Reindel; Morton Halperin, Director of the Center for National Security Studies, who is accompanied by Jerry Berman, legislative counsel for the ACLU; Ford Rowan, of Sanford, Adams, McCullough and Beard, and Sol Yurick, of the Pen American Center, New York.

Let me first apologize to the panel for putting you on as a panel, because I had not intended to do that originally. But I do not have to tell you that the time is 12:20, and I would like to bring this to a reasonable conclusion.

I would ask each of you to limit your remarks to 5 or 10 minutes, if you can. Your entire statements will go in the record following your oral testimony. That is probably unfair, but I do not know what alternative I have, except to continue the hearing to another day, and I do not think I want to do that if I do not have to.

Mr. Abrams, we would be happy to hear from you first, sir.

PANEL OF LEGAL EXPERTS:

STATEMENTS OF FLOYD ABRAMS, ATTORNEY; MORTON HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY JERRY BERMAN, LEGISLATIVE COUNSEL; FORD ROWAN, ATTORNEY, AND SOL YURICK, PEN AMERICAN CENTER

Mr. ABRAMS. Thank you, Mr. Chairman. Rather than read any part of my prepared statement, I would like to comment briefly on some of the questions raised today and some of the issues which were put before the various witnesses.

First of all, I would like to make clear something with respect to this issue of whether section 501(c) does or does not apply to public information. That notion comes not from me or any of my colleagues, as I find them today, sitting next to me. Mr. Keuch has testified on a number of occasions before Senate and House committees that indeed, public information was covered. One of the former objections of the Department of Justice, voiced in June to the then draft of section 501(b), for example, was that it applies, so Mr. Keuch testified, to disclosures even of publicly available information by any voter, journalist, historian, or dinner table debater, if the disclosure is made with the intent to impair or impede the foreign intelligence activities of the United States.

Some changes have, to be sure, been made in the intent section, but there is no change with respect to the proposition that what is now section 501(c) applies to public information.

Indeed, Mr. Keuch testified on August 19 in front of the House Subcommittee on Civil and Constitutional Rights of the Committee

on the Judiciary and observed that the Senate bill, the very Senate bill before this committee now, does cover disclosure based on public record material. So I do not think that should be a matter of debate or, indeed, one in which those of us who are troubled by section 501(c) are taxed with having created. Section 501(c) makes it a crime if certain requirements are met, to disclose information which is public information, not just information which has never been known before—specifically, section 501(c) would permit a prosecution of a second or third person who repeated, with the requisite bad intent, information already public in every sense, already public.

I do not think Mr. Keuch would really disagree with that proposition, either.

One of the problems with the legislation in its current form is that it lends itself easily and almost inevitably to a kind of selective prosecution. If it is true that one person who has the bad intent can be prosecuted for saying precisely the same thing as someone who has intent which is not actionable under the statute, we wind up with one prosecution of one person for doing just the same thing as someone who is not being prosecuted and could not be prosecuted. That is one of the things that is wrong with section 501(c).

Now, in my prepared testimony, I suggested a few examples, one or two of which I would like to raise, as to the kind of ordinary journalistic situations under which section 501(c) could permit prosecution.

I suggested, for example, that if a journalist came to believe that the CIA was involved in certain types of gross improprieties, illegal conduct, conduct involving spying on Americans in America, so long as the agents had been abroad within 5 years, or participation in some Watergate of the future; or, what I said, hopefully, was the most unimaginable scenario of all, which is complicity in assassinations within the United States, that if a series of articles were published about those types of information, naming names of those involved in illegal governmental conduct, under this legislation there could be criminal liability.

Now, Mr. Keuch tells us, and I understand everyone who has testified so far to tell us, that that is not a real problem, that what they are really after are other things, other people, bad people who publish bad things. The statute does not do that. The statute is not limited by its terms, as if it could be—and it cannot—to cover people that we do not like or that publish more offensive things or that publish them first, rather than second or third. The fact of the matter is that the statute has language requiring a pattern—I think that is a good thing, if we are going to have 501(c). I would prefer to have some requirement of a pattern of behavior, because it is some protection.

The fact of the matter remains that a pattern of behavior can be a series of articles. No assurances by Mr. Keuch today can gainsay that proposition of law on reading the language of the statute.

We are told that there is a lot of protection in the new draft of the statute, because there cannot be any liability unless the person who reveals information has reason to believe that the disclosure of the names would impair the foreign intelligence activities of the United States.

Senator Metzenbaum, I have been personally involved in situations in which I have thought that the head of the CIA has served the country well by advising the newspapers and broadcasters in advance of

publication of his view that it would not be in the national interest to publish certain material. I thought he acted well, and I thought that they acted well, on a number of occasions, in not printing that information. Yet, under section 501(c), every time hereafter that there is communication between the Director of the CIA or some other governmental official and a newspaper or broadcaster in which they are told in advance of publication in substance, "You really should not do this; it would really be harmful if you do it," it seems to me that all that can and likely would be used against them in any kind of criminal prosecution.

I believe—and now I come to the six cases that I cited, and let me say that I will agree, if I may say so, with Senator Simpson, that my analysis is a limited one. It is a citation to a few cases, and I would be glad, if I may, to supplement that with perhaps a later letter to the committee.

Senator METZENBAUM. I would ask you to do so, in a similar vein that we have asked Mr. Keuch to have the Department of Justice analyze those cases. We would appreciate it.

Mr. ABRAMS. If I may very briefly now, what they say, though, is that once information is out, it is out. And they say it in a wide variety of circumstances. I was involved in a few of these cases, and I remember them well. There is a case here, for example—not a CIA case, not an FBI case, but a case involving a secret judicial panel, which was looking into the question of whether—when anonymous, sometimes, charges were made against judges in the State of Virginia, as it happens—there was any basis for that.

There was a good reason for that statute, a good reason to do it in confidence. It would defame public officials if it came out before there was any showing of cause. There is a good reason for not having public hearings until some panel first makes a decision that there is something to the charge. And yet, information about one juvenile court judge became known by a Norfolk, Va., newspaper, and they published the information that they had about the judge. They were charged and convicted of the criminal offense of publishing the name of a judge under investigation by this secrecy panel. And the Supreme Court unanimously held, reversing the Supreme Court of Virginia, that that was unconstitutional; that once the information was out, it could not be made criminal. Once information leaks, even if we would choose it not to leak, if we could but choose, once it is out, it is out. And that is one of the things I think is wrong and likely unconstitutional about section 501(c). It is not limited—probably could not be, in any event—it is not limited to the first person who gathers information by ferreting it out and then leaking it in some fashion. It is limited to everyone, any time he publishes or otherwise discloses that information, so long as the person meets the other requirements of the statute, so long as it is part of a pattern of activities, so long as the Government has not affirmatively made it known previously.

So, while I would rather do a brief in writing than orally, at least in the first instances, it does seem to me that cases like this lend substantial support to the proposition that once information is public, it is public. And it is not a quotation out of context, I assure you, when I quote the Chief Justice of the United States as saying that "The Government cannot restrain publication of whatever information the

media acquires and which they elect to reveal." I will follow that up, if I may, by a letter to the committee.

The only other things I would like to add, apart from responding to any questions, are these. My problems with 501(c) are not drafting problems. I think you could do it a little more narrowly, and I would prefer, I think, if I had to choose, some combination of the Senate bill and the House bill. I like the pattern of activities language of the Senate bill, and I do prefer, from a first amendment point of view, the intent requirement of the House bill. But my problem with section 501(c) is really broader than that.

I believe that if you make illegal, under almost any circumstances, the publication of material which has been made public—or at least, may have been made public, and this statute includes that, as Mr. Keuch has testified—which may disclose wrongdoing of a dangerous nature by the agency itself, and as to which there is no affirmative defense of any sort contained in the statute, and need not even be classified, that we start down a very dangerous and certainly novel path.

Mr. Chairman, Ambassador Carlucci had a line in his prepared text which I would like to conclude by referring to. He said:

> Nothing could be more subversive of our constitutional system of government than to permit a disgruntled minority of citizens freely to thwart the will of the majority.

I do not know of a statement I have read in recent years by a Government official which is so directly antithetical to the first amendment. I believe that nothing, in fact, can be more subversive of our constitutional system of government than to permit an unhappy majority of the citizens to thwart the rights of the public to freely express themselves.

The first amendment, Mr. Chairman, as has often been said today, is not absolute. It is at least firm enough, in my view, to conclude that section 501(c) is unconstitutional.

Thank you.

Senator METZENBAUM. Thank you, Mr. Abrams. I had not noted that statement of Mr. Carlucci. Could you read those words back to me?

Mr. ABRAMS. It is on page 5.

> Nothing could be more subversive of our constitutional system of government than to permit a disgruntled minority of citizens freely to thwart the will of the majority.

Senator METZENBAUM. I think it might be good for him to go back and learn a little bit about our Nation's history. He might even come to the floor of the Senate sometime and learn that the minority does have certain protections—I am glad to tell my friend on my left, who is usually on my right. I am just as disturbed as you are by that statement. It is inappropriate for a representative of the Government to have made.

Thank you, Mr. Abrams.

I am going to hold questions, if that is all right with you, Senator Simpson——

Senator SIMPSON. That is fine, Mr. Chairman. I would just add one thing. I will hunch that I am the only fellow in the U.S. Senate who

has been a member of the minority as well as the majority in a legislative body, politically. It gives you an interesting insight. Everybody needs that from time to time.

Senator METZENBAUM. Mr. Halperin, we are happy to have you with us.

Mr. HALPERIN. Mr. Chairman, I want to express our appreciation to you for holding these hearings and providing another look at this bill.

Mr. Keuch said, as he was finishing, that in his view, public debate does not require the seriatum disclosure of the names of individuals working for their country. I think I agree with that. The problem is that the statute before us does not simply punish the disclosure, the seriatum disclosure of names of people working for their country. It is far broader than that.

Indeed, I would suggest that if you listen to the testimony this morning and read the prepared statements, it sounds like we are dealing with a very different statute. And let me, using phrases and sentences that appear in the testimony, suggest the statute that people have been defending today.

It is a statute that would state something like this:

> Whoever, with the intent to cripple the foreign intelligence activities of the United States, discloses the name of and American agent serving abroad in an authorized activity, with the intent that the disclosure itself would disrupt intelligence activities, and knowing that the disclosure would place the name of the agent in jeopardy.

Now, I would suggest that if we were dealing with a statute that read something like that, that Senator Chafee's uncle, Professor Chafee, would find it constitutional. It is consistent with the language in the quote from Professor Chafee that is in Senator Chafee's testimony.

The problem is that the language we are dealing with in this bill is far different. There need not be an intent to cripple. There need only be a reason to believe that it would impair or impede. One need not reveal a name, but only information that may identify somebody. It is not limited to employees of the U.S. Government, but covers U.S. citizens who are agents, informants, or sources of operational assistance. It includes also foreigners who are agents, informants, and sources of operational assistance. It covers people who formerly were agents, if they are foreigners. It covers not only people who are abroad, but people who are at home, including U.S. employees who have served abroad in the last 5 years. And, contrary to what the FBI testified to today, the bill covers American citizens who are FBI informants who are serving at home, and not only foreigners, and that is the provision of the bill that raises the most difficulty. It does not require, contrary to what was suggested earlier, that the activity be authorized. If the FBI was engaged in a counterintelligence investigation which violated their secret foreign intelligence guidelines, there is nothing in this bill that would nevertheless exclude from criminal penalties somebody who revealed the name of an informant who was engaged in an unauthorized counterintelligence investigation.

And finally, there is no intent, or even reason to believe, or even reckless disregard of the fact that lives would be placed in jeopardy. The disclosure need not place anybody's life in jeopardy. It need not